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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 488

W. F. SNAKARD, *Petitioner*

v.

FRANKFORT OIL COMPANY, *Respondent*
A division of Carstairs Distilling Co.
(now Calvert Distilling Co.)

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PEYTON FORD
1000 Connecticut Ave., N. W.
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*
(Inside Front Cover)

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

FORD, LARSON, GREENE
AND HORAN
Washington, D. C.

JOHN B. DUDLEY, JR.
DUDLEY, DUDLEY & DUDLEY
Oklahoma City, Oklahoma

CLYDE J. WATTS
LOONEY, WATTS, LOONEY
& NICHOLS
Oklahoma City, Oklahoma

P. D. ERWIN
Chandler, Oklahoma

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 18, 1960.

### CITATION TO OPINION BELOW

The United States District Court for the Western District of Oklahoma gave judgment for petitioner without opinion. That court's findings of fact and conclusions of law are unreported but are in the record at pp. 115-127, and are reproduced herein in Appendix A. The opinion of the United States Court of Appeals, Tenth Circuit, is reported in 279 F. 2d 436 and printed in Appendix B hereto.

## QUESTIONS PRESENTED

1. Whether a United States Court of Appeals, when it determines that an essential fact has not been found by the trial court trying the case without a jury on disputed evidence, predominantly oral, must remand the case to the trial court so that a finding may be made under Rule 52 of the Federal Rules of Civil Procedure?

2. Whether a United States Court of Appeals, when the trial court has failed to make an essential finding of fact may act as a trial court and supply the omitted finding without violating Rule 52 of the Federal Rules of Civil Procedure, especially when the evidence in the trial court was in conflict?

3. Whether a United States Court of Appeals, in reviewing findings of fact made by a trial court on disputed evidence in a case involving slander of title, may refuse to give force and effect to a state statute and state Supreme Court decisions thereunder which prescribe that the element of malice is presumed when there is an injurious publication and no justifiable motive for making it is show ?

4. Whether the action of the Court of Appeals for the Tenth Circuit in reversing a judgment for petitioner and dismissing the complaint so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

5. Whether a *successful* litigant in a nonjury case in a United States District Court must object to the omission of a finding of fact by the trial court, and whether a United States Court of Appeals may reverse on that ground without remanding the case to the trial court to supply the omitted finding, when the case was decided

in that litigant's favor in the District Court after the trial judge had heard and considered conflicting evidence, predominantly oral?

6. Whether a successful litigant in a nonjury case in a United States District Court as appellee on appeal to a United States Court of Appeals is entitled to have the evidence viewed in the aspect most favorable to it, and to have the benefit of all reasonable inferences deducible therefrom?

7. Whether a United States Court of Appeals may substitute its own findings of fact for those of the District Court and reverse the District Court judgment without ruling that the lower court's findings are clearly erroneous?

8. Whether a United States Court of Appeals may reverse a United States District Court nonjury judgment in favor of petitioner *and direct the District Court to enter judgment in favor of respondent*, when the pleadings and record indicate another sound basis was raised for the trial court's decision, which is unaffected by the omission of an essential finding and other bases relied upon by the Court of Appeals to reverse?

## STATUTES INVOLVED

### Federal Rules of Civil Procedure

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which con-

stitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Title 12 Oklahoma Statutes, Section 1445:

An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.

Title 54 Oklahoma Statutes, Section 10:

In all proceedings connected with the formation, conduct, dissolution and liquidation of the partnership, every partner is bound to act in the highest good faith

toward his co-partners. He may not obtain any advantage over them in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.

## JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1960. (T.R. 970; App. B). Rehearing was denied on July 21, 1960 (T.R. 1020). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATEMENT

Involved in this petition are the petitioner, W. F. Snakard, an oil operator,[1] and the respondent, Frankfort Oil Company, a division of Calvert Distilling Company, a Maryland corporation. Prior to May 31, 1955, Frankfort was a division of Carstairs Distilling Company which merged with Calvert on that date. The jurisdiction of the District Court was invoked because of diversity of citizenship, petitioner being a citizen of Oklahoma and respondent a citizen of Maryland.

The oil properties involved are located in Lincoln County, Oklahoma, and collectively are known as the North Wellston Field. In earlier years oil was recovered at a substratum known as the First Wilcox, which was more or less depleted before the advent of the circumstances of this case. The oil involved here was discovered at a substratum designated as the Second Wilcox, largely due to the perspicacity of petitioner.

[1] Mr. Snakard is an oil explorer, a person who independently searches for wells that will be productive of oil. It is a hazardous, uncertain living, depending upon a man's skill and knowledge as well as luck. Working on little capital, he must rely on oil companies to drill his leases. If the wells are dry, he loses all of his investment. If oil is found, he must rely on his co-venturers for fair treatment.

Prior to October 12, 1954, petitioner acquired twelve commercial oil and gas leases on 1280 acres in Lincoln County, Oklahoma. Most of the leases commenced on July 1, 1954, and expired on or before July 1, 1955.

Between October 12 and November 11, 1954, petitioner and respondent entered into a series of agreements in connection with petitioner's leases. Under these agreements:

1. Respondents acquired ½ interests in petitioner's leases with first refusal option to purchase petitioner's remaining share. (T.R. 18) (Fdg. 1)

2. Petitioner contracted to drill the first test well on the leases involved. (T.R. 20) (Fdg. 2)

3. Should the test well be productive, the respondent would become the "operator of all the properties," for full development of the whole block of leases. Thereafter petitioner could elect to participate in the development of any subsequent wells and pay ½ the expense. If he did not participate, then Frankfort would own ⅞ths of the production until 200% of ½ of the cost of drilling the well had been paid to Frankfort from ⅜ths of the working interest production. Then the ⅜ths would revert to petitioner. At all times petitioner would be liable for ⅛th of the operating cost of any producing well. (T.R. 26, 29) (Fdg. 3)

4. Later changes provided that the test well would be a new drilling instead of a reopened old well, and that as to a few subsequently acquired portions of leases allowing a ¼th owner's royalty the additional royalty would come from petitioner's half interest in the lease. (T.R. 51, 52)

The several instruments involved are printed as Appendix C hereto.

In January 1955, petitioner completed the test well designated as Stanolind No. 1 and it gave indications of excellent oil prospects in the so-called Second Wilcox stratum, but water problems prevented actual commercial production at that time. (Fdg. 6)

Respondent, realizing the good prospects augured by Stanolind No. 1, undertook to fulfill its commitments but gave no notice to petitioner of any intent to drill. (Tr. 137). It brought in the Inland Oil Company to operate for it in the North Wellston field.[2] (T.R. 137; 197-200) Inland, which was so closely related to respondent that the latter considered it its "district office" (Pl. Ex. 2-B, T.R. 590), began drilling after the Stanolind discovery to the west of it. Around March 1, 1955, it brought in an excellent producing well in the Second Wilcox known as Erwin No. 1. (Fdg. 9) A month later Inland brought in another producer directly east of Erwin No. 1, called Meadors Estate No. 1. Thereafter Inland drilled a series of wells north and mainly east of Erwin No. 1, up to July 1955. (Fdg. 16)

Immediately after the first producer, Erwin No. 1, was completed, respondent approached Mr. Snakard, the petitioner, about "farming out" the leases to Inland. (Tr. 144) "Farming out" would have reduced petitioner's interest in this promising property by ½. He refused. Shortly thereafter one of respondent's Inland employees, Burkey, offered to buy petitioner's interest in the North Wellston Field for $100,000 to be "paid" by Inland.[3] (Fdg. 10) He refused. (T.R.

[2] Inland was a defendant in this case, but because of its bankruptcy, the complaint was dismissed without prejudice. (T.R. 132)

[3] Inland was $200,000 in the red at this time (T.R. 234), and the $100,000 was to be supplied by respondent. (T.R. 503-505) Respondent's general manager, M. R. Shaffer, could not "recall" whether he discussed this deal with his Inland employees, but did not deny it. (T.R. 350-351)

234) The "farm out" request was then renewed by respondent. (Fdg. 10) Despite respondent's holding out to him that the most promising direction for drilling lay to the northeast and did not include the leases to be farmed out or sold, petitioner refused the offer to sell and the demands for farming out to Inland. The other reason for farming out given to Snakard by respondent was that possibilities were doubtful to the south. (Tr. 148)

While respondent was thus pressuring Mr. Snakard to sell out to its "District Office" or to reduce his interest in the leases south of Erwin No. 1 by farming out, it was in possession of geologic data obtained through a seismograph study and other studies which were withheld from Mr. Snakard (T.R. 268), although he was billed for part of it (T.R. 313-316). The data showed that the most promising area from Erwin No. 1 lay to the south and was included in leases Mr. Snakard urged developed. (T.R. 265-7) (Fdg. 16).

From tests made on Erwin No. 1, Frankfort's Exploration Manager, Caswell, reported to its management on April 1, 1955 that "in his opinion a forty acre location on this Second Wilcox structure had a potential production of two million barrels of oil", and that the two locations south of Erwin No. 1 were about "as sure as you could have" for Second Wilcox production. (T.R. 406, 410, 415) (Pl. Ex. 22, T.R. 592) (Fdg. 17)

At about the same time the President of Inland, Cochran, and its Geologist, Roy Carmach, went to Bartlesville, Oklahoma and displayed to M. R. Shaffer, Frankfort's General Manager and C. A. Caswell, its geologist, a sub-surface geological map, which showed the top of the Second Wilcox structure extended onto

the Thomas and Christian leases (T.R. 259-261, 415-417), both south of Erwin No. 1.

Following petitioner's refusals either to sell out his interest to Inland Oil or to farm out to Inland Oil,[4] respondent, on March 8, 1955, filed a caveat in the office of the County Clerk of Lincoln County (Fdg. 12) that was designed to and did eventually prevent petitioner from saving his interests in the leases south of Erwin No. 1.[4] The Caveat read:

"Caveat

State of Oklahoma, County of Washington, ss:

Know All Men By These Presents:

Whereas, by letter agreement dated October 12, 1954, accepted by W. F. Snakard on November 11, 1954, the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., entered into a contract with W. F. Snakard covering the following described land located in Lincoln County, Oklahoma:

All of Section Thirty-five (35) and Southwest Quarter (¼) of Section Thirty-six (36), Township Fifteen (15) North, Range Two (2) East; and West One-half (½) of Section Two (2) and Northeast Quarter (¼) of Section Three (3), Township Fourteen (14) North, Range Two (2) East, and:

Whereas, said contract provides for the sale, transfer and assignment of W. F. Snakard to the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., of an undivided ⅞ths interest in and to all of the oil and gas leases then owned or thereafter to be acquired by W. F. Snakard on the above described land.

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[4] At T.R. 342, M. R. Shaffer, respondent's general manager, testified that the caveat's purpose was to protect respondent's "vested interest" in the leases.

Now, Therefore, the undersigned Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc., does hereby notify the world that it has performed all of the terms of said contract with W. F. Snakard and is entitled to and is the owner of an undivided 7/8ths interest in and to all of the oil and gas leases covering the above described land and any party purchasing same does so at his own risk and peril and with notice of the rights of the undersigned adverse thereto.

Witness, the execution hereof this 5th day of March, 1955.

Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc. By M. P. Shaffer, Manager

State of Oklahoma, County of Washington, ss:

Before me, the undersigned, a Notary Public, in and for said state, on this 5th day of March, 1955, personally appeared M. R. Shaffer, to me known to be the identical person who subscribed the name of the maker thereof to the foregoing instrument as its Manager and acknowledged to me that he executed the same as his free and voluntary act and deed, and as the free and voluntary act and deed of such corporation, for the uses and purposes therein set forth.

Witness my hand and official seal the day and year last above written.

Imogene Coleman, Notary Public

My commission expires: May 27, 1958 (SEAL).

Filed: Lincoln County, Oklahoma, Mar. 8-1955- 9:00 A.M., Gerald Clark, County Clerk, By Deputy (SEAL)." (T.R. 15-16)

As petitioner pointed out at page 13 of his Petition for Rehearing, Frankfort:

> "thus stated to Snakard and the world:
>
> (1) We have chosen the drilling commitments on each and every separate lease in the block.

(2) We have drilled a well on each of these leases.

(3) We have obtained production from each of these wells.

(4) Snakard has not paid one-half of the costs of drilling such wells.

(5) We, therefore, own seven-eighths of the leases (not production).

This was an absolutely false statement and was the assertion of an absolutely false interest, because it had not obtained production but from one well, had not drilled and obtained production from any other well and had not performed its contract, and therefore did not possess a seven-eighths interest in any of the leases other than the one it had obtained production from. It was particularly false, deliberate, unjustified, and therefore, malicious if, as Frankfort, has always maintained, it had no intention or obligation to drill these wells (Cf. Court's Findings and Conclusions, R. 121)."

Not only was this caveat a breach of the duty respondent owed its co-venturer, but it was a slander of title, asserting, as it did a $\frac{7}{8}$ths interest in the leases, when in fact it only held a $\frac{1}{2}$ interest in production unless it actually drilled *and* brought in a producing well on any give lease. Furthermore, Frankfort's caveat asserted ownership of $\frac{7}{8}$ths *of the leases*; even had it drilled them and achieved production, it would have acquired only a *temporary* $\frac{7}{8}$*ths interest in the production of the well*, lasting only until the cost was paid back under the contract terms. Without even going on these lands and drilling Frankfort deliber-

ately represented to the "world" that it owned more of these leases than it could have owned even if production were achieved. Of course, after July 1, 1955, when the joint venture expired and Frankfort still refused to withdraw the caveat, this misrepresentation, this slander of title, became an even greater lie because then Frankfort owned nothing. Only bad faith, and thus malice, explain Frankfort's action.

At the trial, respondent contended that the caveat was prepared and filed because petitioner had failed to deliver assignments to Frankfort covering the undrilled leases. (This included all but the Erwin and Stanolind leases, which had been drilled at that time.) (T.R. 424) But cross-examination of Frankfort's attorney, Trippet, who gave the testimony referred to above, brought out the facts that:

1. He, Trippet, was to prepare the instruments of assignment (T.R. 430), and send them to petitioner (T.R. 431).

2. Petitioner had made the necessary assignments for the only leases drilled at the time of the caveat, the Erwin and the Stanolind. (T.R. 430, 431)

3. He never wrote any letters to petitioner, prior to the April 8, 1955 letter, requesting assignments. (T.R. 431)

4. He never sent any assignments to petitioner to be executed before he and petitioner's attorney in late April, "worked out the deal." (T.R. 431)

The demands upon petitioner to farm out continued after the filing of the caveat.

When the caveat failed to force petitioner into the farm out, respondent decided to drill to the north and east, leaving the Thomas and the Christian undrilled. This was calculated to obtain petitioner's consent to the farm out. If the farm out deal had not been contemplated, Frankfort would have drilled both the Thomas and the Christian leases (T.R. 362).

Finally, in June, with the July 1, 1955 deadline fast approaching, petitioner asked respondent to release the caveat so that he could contract with someone to commence drilling on the south leases and save them. *Although Frankfort's attorney advised release* (T.R. 439), Snakard was refused. In desperation, on July 1, 1955, he moved equipment onto two of the leases, the Thomas and the Christian, to begin drilling. He was unable to get anyone to drill on three other leases because of the caveat. (T.R. 168-170, 188)

Respondent obstinately refused to allow petitioner to save his interest even though it had no intention of saving them itself. In a telegram on June 28, 1955 (Pl. Ex. 16, T.R. 582) respondent's vice president demanded petitioner to farm out to Inland and accused him of tryng to "squeeze out" Frankfort. (Pl. Ex. 16, T.R. 582)

Respondent may have thrown away its opportunity to profit from the rich Thomas and Christian leases, for reasons known only to the men who ran it.[5] But, having done so, it was determined that petitioner would salvage nothing either. It complained to the Corporation Commission and had petitioner's operation stopped several times by claiming the well he was drilling was

[5] See p. 24, paragraph 8, *infra*.

"off-spot"[6] (T.R. 164, 165, 251) although no complaint was made when a subsequent operator, not connected with petitioner, drilled "offspot" (T.R. 222) on the Christian lease, after petitioner had to give up.

Even after the joint venture of petitioner and respondent expired (by expiration of the leases), Frankfort refused to remove the caveat. Its presence in the County Clerk's records eventually forced Mr. Snakard to abandon his effort to save the Thomas and Christian leases because he was unable to obtain the necessary funds. The caveat killed the interest of possible financial aid. (T.R. 192-3, 255, 278) Petitioner pleaded with Frankfort's officials (Pl. Ex. 25, T.R. 597) but to no avail. Despite the fact that Frankfort's ½ interest in the undrilled leases ended on July 1, the caveat asserting a ⅞ths interest remained filed of record until February and March, 1956.

The Christians, father and son, on or about July 7, 1955, themselves tried to have this caveat removed as to their lease. They went to see Eldon E. Scott, Frankfort's attorney at Bartlesville. He refused them in the following language:

> "I don't give a goddamn what anybody says. I'm not going to release anything that Bill Snakard has got his hands on, now or ever. * * * Bill won't keep his word with anything. * * * We had a deal made with Inland Oil and Gas Company down there to farm that stuff out. * * * He blowed that up for us. * * * We are not going to do anything to help him or anybody else, and we are not going to release it." (T.R. 217-218)[7]

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[6] "Offspot" means a well that is not in a position approved by the Corporation Commission in relation to adjacent leases.

[7] Scott was a defense witness and was present in court. He did not deny this testimony.

Mr. Christian and his father were obliged to hire an attorney who finally succeeded in getting Frankfort to release its caveat in March, 1956 after Shakard had to give up. His driller, Bradley, had to withdraw in December, 1955. (T.R. 252)[8] (Pl. Ex. 28, T.R. 631) The release was made only after respondent knew peti-

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[8] Joe Bradley agreed with Petitioner to drill the Thomas lease to the Second Wilcox and obtained financial backing of Helmerich and Messenger of Chicago but Respondent refused to release its Caveat and Bradley could not get the money to drill. This refusal was in late July after the expiration of the Thomas lease (T.R. 253-255). Consider this colloquy:

> "The Court: Was there any other reason why you couldn't drill except this Caveat? • • •
> The Witness (Bradley): Well, your Honor, I was. I didn't have the money to drill it and I couldn't get nobody to help me put any money in there with me.
> The Court: I know was the Caveat—
> The Witness: (Interposing) That seemed to be the main reason, yes." (T.R. 255)

As late as January, 1956, Respondent refused to release its Caveat and a deal that Petitioner made with the Burke Royalty Company to finance the drilling of the Thomas, Christian and Simpson leases fell through when Respondent refused to release the Caveat unless it received an interest in the leases. Rupert E. Wilson, Jr. representing Burke Royalty so testified (T.R. 278). Marion Christian testified (T.R. 216) that, although Petitioner's lease on his property expired July 1, 1955, he could not make a new lease to Joe Bradley or a number of others because "none of them would do anything as long as this Caveat was on there." Carl Simpson testified (T.R. 274) that it was February, 1956, before he could get Respondent to release its Caveat on his property. Meanwhile Simpson had been anxious to lease to Petitioner. S. F. Christian testified (T.R. 321) that about July 7, 1955, Respondent refused to release the Caveat on the Christian lease because it disliked Petitioner and he had to hire a lawyer to obtain the release. Petitioner testified as to his deal with Bradley to drill the Thomas, Christian and Simpson leases and how Bradley let him out of the contract when he "couldn't give him clear title" (T.R.

tioner was no longer drilling on it. (T.R. 629, Pl. Ex. 27-B) Snakard did not obtain a renewal of the lease.

After Mr. Snakard's withdrawal, other parties brought in ten producing oil wells, between July 1955 and July 1958, on leases Frankfort refused to drill or release, three on the Christian, six on the Thomas, and one on the Simpson. (Pl. Ex. 7 and 8 T.R. 915, 919)

During the months prior to July 1 when petitioner was endeavoring to get respondent either to drill the leases south of Erwin or to release the caveat so that he could save them, respondent was receiving data indicating more and more that the south leases would be rich in oil. (Fdg. 16, 17) It not only refused to act on this data and withheld it from Mr. Snakard (Fdg. 18) in violation of its fiduciary duty, but it deliberately and falsely indicated to him that the leases to the north were more promising. Its conduct had an effect on others who might have helped petitioner.[9] (T.R. 151, 216) (Fdg. 19)

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167); and, Petitioner also offered to prove that a similar deal with Burke Royalty fell through when he could not clear the title and that he had similar unsuccessful discussions with Armond Jule, Robert L. Owen and T. C. Christenson of Los Angeles (T.R. 171).

[9] For instance, Joe Wolf, President of the Summit Drilling Company, one of the oldest drilling companies in Oklahoma and financially capable of drilling a well to the depth of the Second Wilcox sand (T.R. 186-187) testified that petitioner asked him to drill the Thomas lease before it expired on July 1, 1955. Wolf refused to finance the drilling because respondent had not drilled. He told petitioner that "if it wasn't good enough" for respondent to drill, it wasn't good enough for him (T.R. 188).

Yet when shown some of the geological information (Plaintiff's Exhibit 33-D), Wolf said it showed "a terrific picture in anybody's oil experience" and was "a perfect place for a well" (T.R. 188 and 193-194).

Frankfort prepared all the instruments comprising the joint venture. A printed operating agreement was among these, but it was modified in an important respect by a separate letter agreement (App. C-3) which made Frankfort the "operator", gave it the right to choose which leases to drill and left Snakard only the choice of participating or not. Snakard could also elect to drill himself leaving Frankfort the choice of participating or releasing all interest in a given lease. After it became obvious that the lease block was going to be very productive, Frankfort "elected" to drill all the leases in a letter to petitioner on April 8, 1955. (Fdg. 13) [M. R. Shaffer admitted the letter referred to all the undrilled leases (T.R. 382)]. With this in mind, Frankfort's actions become transparent. It is required oil field practice to drill "offset" wells following an important strike. Offsetting is to drill new wells in all directions from the proven producer in order to trace the oil deposit. In this case Frankfort *chose* to drill only to the north. Some justification, if the geologic data in Frankfort's hands is ignored for the moment, may be found for the first 2 or 3 wells. These were offsets north, northeast, and east, but the next three were even further north beyond all of these despite the fact that these were dry, while not a single drill was set up south or southwest of that first producing well, Erwin No. 1, which was still the best.[10] [M. R. Shaffer stated in a deposition that the geographical map showing the Thomas lease to be better than Erwin No. 2, was not in respondent's possession when the latter was drilled on May 29, 1955. The map was dated May 16, 1955. (T.R. 383)]

[10] If Erwin #1 is considered the center of a clock, respondent drilled at 12, 2, and 3; and then beyond these unproductive offsets, leaving the lower half of the clock untouched.

Frankfort deliberately refused to validate the south leases despite its knowledge of the excellent prospects there, and despite its duty to its co-venturer to do so.

But the wrongs involved do not stop with Frankfort's choice of its drilling sites, its denial of the geologic data to Snakard, nor its outrageous caveat. In its desire to squeeze out its co-venturer, it even represented to him and to the Corporation Commission, an agency of the state, that a non-producing well, Erwin No. 2 was a producer.[11] This was accomplished by hooking Erwin No. 1 and No. 2 to the same storage tank and representing the oil therein to be the product of both wells when it all actually came from No. 1, which was overproducing to fill its quota and No. 2's quota, set by the Corporation Commission. (Fdg. 21) And later W. R. Shaffer told petitioner that one of the dry wells north of Erwin No. 2, was a hundred barrel an hour producer (T.R. 216). This was false. (T.R. 235).

These and other actions of respondent resulted in enormous losses to petitioner actually in excess of the One and one-Half Million Dollars awarded by the Trial Court in this case. For brevity and to avoid unnecessary repetition, other incidents and facts will be brought out in subsequent portions of this petition.

**Disposition in the District Court**

This case was originally filed in the Lincoln County District Court by petitioner. It was removed to the United States District Court for the Western District

[11] M. R. Shaffer, the general manager of respondent, told the unbelievable story on the stand that he thought Erwin No. 2 was a producer until shortly before the trial, that he neglected to read company reports and logs indicating it was dry. (T.R. 376-9)

of Oklahoma on the motion of respondent because of diversity of citizenship. Petitioner sought a money judgment for damages resulting from breach of contract and slander of title, the appointment of a receiver for the leases involved, and the removal of the caveats.

The case was tried by the Court, the Judge presiding being W. R. Wallace, a jurist exceptionally qualified for the case, having been the General Counsel for Magnolia Petroleum Co. for many years.[12] Judge Wallace decided in favor of the plaintiff after hearing all of the evidence and awarded plaintiff a judgment of $1,493,277.00, plus interest and costs. He made findings of fact and conclusions of law in support of his judgment. (App. A)

The trial court found these facts, among others:

1. That after Erwin No. 1 was found to be an excellent producing well (Fdg. 9) respondent began its attempts to induce petitioner to farm out his interests to Inland, that respondent took "a series of steps calculated to persuade or require plaintiff to accept the farm out proposal with Inland", that these steps continued through March, April, May and June of 1955. (Fdgs. 10 and 11).

2. That respondent filed a caveat adversely to petitioner's interest, which caveat "recited that the contract provided for the sale and transfer from plaintiff to defendant of an undivided 7/8th interest in and to the leases then owned and thereafter acquired by plaintiff, notified the public that defendant had performed its contractual terms and was the owner of an undivided 7/8th interest in and to said leases . . ." (Fdg. 12)

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[12] See *Who's Who In America*, vol. 30, p. 2878, "Wallace, William Robert".

3. That on April 8, 1955, respondent wrote petitioner regarding the undrilled leases and in that letter indicated that respondent elected to drill wells on those leases and requested plaintiff to elect whether to participate or not (Fdg. 13), that on April 15, petitioner by letter elected to be a non-participating party, (Fdg. 16) that on April 18, respondent's attorney notified petitioner that he must execute assignments in the future to each of the leases "as we start wells on them", that "we want to go ahead and get all of these properties drilled by the July deadline . . .". (Fdg. 15)

4. That during April and May of 1955 respondents obtained extensive "seismic information, together with other geological data" which "conclusively showed" that the oil structure discovered at Erwin No. 1 extended southeast into the Thomas and the Christian leases, and that although the acquisition cost of some of this data was charged to petitioner, the respondent never disclosed the data and information to petitioner. (Fdgs. 16-18)

5. That the respondent "repeatedly represented to plaintiff that the producing structure lay to the north and east of the Erwin No. 1 and Meadors Estate No. 1 wells, and that there would be considerable risk in drilling a well on the Thomas lease." (Fdg. 19)

6. That respondent's well drillings were all conducted to the north and east of Erwin No. 1. (Fdg. 20)

7. That Erwin No. 2 was dry, but was reported by respondent as a Second Wilcox producer and that respondent further reported Erwin No. 2 in full production when in fact the oil constituting this alleged production came from Erwin No. 1, and that Erwin No. 2 and other unproductive wells were drilled to the north

and east at a time when respondent had the aforementioned data that the oil structure lay to the south of Erwin No. 1. (Fdgs. 21-22)

8. That respondent was advised by its attorney to release all of the basic leases which were not going to be drilled to plaintiff within a reasonable time prior to July 1, so that plaintiff could effectively deal with such leases (Fdg. 24)

9. That petitioner "substantially performed all obligations resting upon him under the contract" with the respondent. (Fdg. 28)

Judge Wallace reached the following conclusions of law, among others:

1. That a joint venture status and a fiduciary relationship existed between petitioner and respondent under which petitioner had an absolute duty to drill but one well, but each party could elect to drill additional wells on the property involved. (Conc. 1-3)

2. That respondent elected to drill the remaining undeveloped leases and breached its contract with petitioner by failing to do so, that this election was established by the filing of the caveat on March 8, 1955, and by defendant's letter of April 8, 1955. (Conc. 4)

3. That if respondent did not intend to elect to drill all undeveloped leases at the time of the caveat filing that "such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract," that defendant improperly clouded petitioner's title, that this was "contrary to defendant's rights under the agreement and encroached upon plaintiff's contractual

rights, separate and apart from the fiducial relationship." (Conc. 5)

4. That respondent breached its fiducial duty to petitioner "by failing to fairly and openly reveal the geological information it possessed", by misrepresenting the location of the producing structure in attempting to force the farm out to Inland, and by "unwarrantedly claiming a 7/8th interest in this lease through the caveat . . . " (Conc. 6)

5. Petitioner is entitled to damages as a result of respondent's breaches. (Conc. 7)

These findings and conclusions represented the trial judge's considered evaluation of the disputed evidence placed before him. He was, of course, better able to judge the credibility and accuracy of the various witnesses. In reaching his decision, Judge Wallace resolved not only conflicts between the evidence of petitioner and respondent but also between witnesses for respondent. For example, compare the testimony of M. R. Shaffer, a very evasive witness (T. R. 325-398), and C. A. Caswell (T.R. 399-419), as to whether Frankfort Oil Company knew the probability of finding oil on the Thomas and Christian leases.

Judge Wallace made separate findings of fact and conclusions of law on the measure of damages. Both sets of findings and conclusions and the judgment are in the transcript of record at pp. 115 to 127 and attached hereto as App. A.

### The Disposition in the Court of Appeals

The respondent appealed from the District Court's judgment to the United States Court of Appeals for the Tenth Circuit, and the petitioner filed a cross-appeal going solely to the measure of damages.[13] The

[13] Dismissed on petitioner's own motion.

Court of Appeals reversed the trial court and remanded with directions to enter judgment in favor of respondent without any determination that any of Judge Wallace's findings were "clearly erroneous." Petitioner sought a rehearing, but this was denied.

In overturning the judgment of the District Court, the Court of Appeals found:

1. That respondent had no obligation to drill on the undrilled leases.

2. That respondent had no contractual obligation to inform petitioner of the important geological data it had obtained concerning the leases.[14]

3. That if respondent fraudulently misrepresented the potential oil field to the petitioner, petitioner was not injured thereby because he did not act in reliance upon it.

4. That no slander of title could be upheld because the trial court failed to find the existence of malice as a fact.[15]

5. That petitioner and respondent entered into a fiduciary relationship requiring the utmost good faith, but that such a relationship is governed solely by the

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[14] Despite the finding by the District Court that "The acquisition cost of some" of the geological "data was charged" to petitioner. (T.R. 119), in Footnote 11, Judge Breitenstein incorrectly states that "The point urged goes only to the accounting between the parties."

It is strange reasoning that Respondent is free not to disclose to its Joint Venturer valuable geological information, the cost of which in part it is charging to him.

[15] Respondent had not challenged the trial court's findings or lack of findings as to malice in either its "Statement of Points" or in its brief before the Court of Appeals.

terms of the agreement between the parties. The respondent had no contractual obligation to provide petitioner with the important information concerning the oil structure and that there was, therefore, no breach of the duty. The caveat was not a breach of the fiduciary duty because respondent had the right to give notice of its interest in the property, although the caveat failed to describe that interest "with complete accuracy". Finally the court said the respondent did not breach the duty by misrepresenting the direction of the potential oil field. The Court of Appeals decided that respondent did not actually know the best direction despite its possession of the geological data. This completely contradicted the trial court's findings, although the Court of Appeals did not state those findings to be "clearly erroneous."

6. With regard to the refusal of respondent to withdraw the caveat *after* the termination of the joint venture on July 1, the Court of Appeals ruled that such *would have been a slander of title had the existence of malice been found as a fact.*

7. That Frankfort was not attempting to obtain petitioner's interest in the leases inasmuch as it *in fact* did not acquire any interest in those leases after July 1, 1955.

8. That petitioner and respondent were equal losers because of the failure to drill these leases as a result of "bad judgment, bad advice, obstinacy and misunderstanding", implying that because respondent was not unjustly enriched by its conduct that it was not guilty of any breaches toward petitioner.

## REASONS FOR GRANTING THE WRIT

This petition should be granted in order to:

1. Resolve a conflict between the Tenth Circuit and other Circuits in the interpretation and application of Rule 52 of the Federal Rules of Civil Procedure.

2. Resolve a conflict in principle between this Court and the Tenth Circuit in the exercise of the appellate function by federal appellate courts.

3. Decide an important question involving Rule 52 of the Federal Rules of Civil Procedure.

4. Resolve a conflict between the Tenth Circuit and the Supreme Court of Oklahoma in the interpretation of an Oklahoma statute, in determining the existence of the element of malice in proving the tort of slander of title.

5. Determine whether the Court of Appeals in a diversity action may decide, in contradiction of the Oklahoma law and decisions, that the fiduciary duties of joint venturers are only those expressly defined in their contract.

## ARGUMENT

### 1. The Conflict Between the Tenth Circuit and the Other Circuits

Under Rule 52 of the Federal Rules of Civil Procedure it is the function of the District Court sitting without a jury to find the facts. In reversing the District Court's judgment in this case the Court of Appeals for the Tenth Circuit ruled that the court below "made no finding of malice" on disputed evidence which would be an element in the slander of title cause. As set forth in petitioner's Petition for Rehearing in

the Court of Appeals, this conclusion "is not in accord with the record," and it was pointed out therein at page 3:

> "In the findings of fact and conclusions of law at page 121 of the printed record, Judge Wallace said:
>
> 'Frankfort breached its fiducial duty owed plaintiff . . . by *unwarrantedly* claiming a 7/8ths interest in this lease block through caveat placed of record on March 8, 1955 (emphasis ours).'
>
> Moreover, in paragraph 5 of the conclusions, Judge Wallace made the statement that prior to July 1, 1955, it:
>
> 'the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a *deliberate, unjustified assertion of interest* in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract (emphasis ours).'"

However, conceding arguendo that a separate finding using the word "malice" was required, the Court of Appeals should have remanded this case to the lower court for the purpose of making such a finding. As it is, by its ruling on this point, the Court of Appeals has made and supplied a finding of no malice and thereby usurped the trial court's function. This procedure is in direct conflict with:

First Circuit: *United Shoe Machinery Corp.* v. *Kamborian*, 160 F. 2d 461. In a patent case the trial judge rendered an opinion comprised of facts and law. As to a "critical point" of fact, the opinion was "equivocal." It was remanded for the single finding to be made.

Second Circuit: *Stella* v. *Graham-Paige Motors Corp.*, 232 F. 2d 299. Trial judge in a stockholder's action to recover short swing profits failed to make a finding because of his interpretation of burden of proof. Court of Appeals resolved the law as to burden of proof and remanded for a specific finding by the trial judge.

Third Circuit: *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122. This case was remanded because of lack of findings required by Rule 52(a). See also *Hopkins* v. *Wallin*, 170 F. 2d 136.

Fourth Circuit: *Hunter* v. *Scruggs Drug Store*, 113 F. 2d 971. In a bankruptcy case, the trial court omitted to make certain findings. The Court of Appeals found it "therefore necessary" to remand for findings. See also *City of Sumter* v. *Spur Distributing Co.*, 110 F. 2d 649.

Fifth Circuit: *Winter Park Tel. Co.* v. *Southern Bell Tel. and Tel. Co.*, 181 F. 2d 341. Trial court granted summary judgment for plaintiff without making any findings of fact. The Court of Appeals said:

> "In the absence of specific findings of fact and conclusions of law by the lower Court we will not undertake to say that there is no sufficient evidence to establish a right to recover the amount of the judgment in a suit at law upon an express or implied contract, although we have considerable misgivings on this score. . . ."

The case was remanded for findings of fact and conclusions of law. See also *Victory Towing Co.* v. *Bordelon*, 219 F. 2d 540, quoting *Kelley* v. *Everglades Drainage District*, 319 U.S. 415.

Sixth Circuit: *Bach* v. *Friden Calculating Mach. Co.*, 148 F. 2d 407. The trial court in a breach of contract action failed to make findings of fact and conclusions of law as required by Rule 52(a). The Court of Appeals, in discussing the omission, said that Rule 52(a) "was advisedly made mandatory and its language 'shall find the facts specially and

state separately its conclusions of law' makes the Rule applicable to every action tried upon the facts without a jury. . . ." The case was remanded to the District Court for findings and conclusions.

Seventh Circuit: *Kweskin v. Finkelstein*, 223 F. 2d 677. Trial court concluded against plaintiff, but failed to make findings of fact. Court of Appeals reviewed the record and although it stated it could not understand trial court's conclusion in view of the evidence, *it remanded the case for findings.* See also *Indemnity Ins. Co.* v. *Midwest Tranfer Co.*, 184 F. 2d 633.

Eighth Circuit: *Helfer* v. *Corona Products*, 127 F. 2d 612. The trial court failed to make findings of fact and conclusions of law and the Court of Appeals reviewed the case without them only because it had been a protracted litigation, the appellant was appealing in forma pauperis, and he urged the court to treat the report of the master and the opinion of the trial court as in compliance with Rule 52.

Ninth Circuit: *Paramount Pest Control Service* v. *Brewer*, 177 F. 2d 564. When "the record shows that there has been an omission in the trial court to find indispensable facts upon which the controversy in law depends, the Court of Appeals will remand the case to have the essential findings supplied by the trial judge." Citing *Hunter* v. *Scruggs* (C.A. 4, 1940) 113 F. 2d 971.

Ninth Circuit: *Irish* v. *United States*, 225 F. 2d 3:

> "This court is not the trier of the facts, nor does it substitute its own judgment for that of the trial court." "In a case where the necessary findings are lacking on appeal, the court does not dismiss the appeal, but vacates the judgment and remands the case to the district court for appropriate findings of fact." See also *Deering-Milliken & Co.* v. *Modern-Aire of Hollywood*, 231 F. 2d 623.

D. C. Circuit: *Fletcher* v. *Fletcher*, 219 F. 2d 768.

> "We are unable to exercise our appellate function . . . in the absence of findings . . ."

Although the Court of Appeals after reviewing the record felt that "*all the evidence*" was contrary to the trial judge's decision, the case was remanded for findings. See also *Burrell* v. *Martin*, 232 F. 2d 33; *Campbell* v. *Campbell*, 170 F. 2d 809.

That the Tenth Circuit's departure from the correct rule is firmly established in that circuit and not a one case aberration is indicated by its ruling in another nonjury case less than one year prior to to this case. In *United States* v. *Horsfall*, 270 F. 2d 107, a district court decision in a Federal Tort Claims Act case was appealed by the United States. The issue was limited to amount of damages. A total award of $85,440.06 was itemized by the district court to include:

> "Future loss of time . . . . . $17,550.00"
> "Permanent Disability . . . . . 45,000.00"

The trial judge found that the plaintiff had "sustained permanent disability and disfigurement" and that he "will sustain extensive permanent disability." He made no specific finding as to future loss of time. The Court of Appeals stated:

> "It is impossible for us to make any such determination (that findings were clearly erroneous) here as we cannot ascertain from the findings how the trial court gave effect to an important element of damage."

Having made this statement the court then made the startling decision to reverse and remand the case *with directions to enter an order requiring plaintiff to remit $17,550.00 of the judgment or face a new trial* on

damages. This decision is clearly in conflict with the correct rule prevailing in other circuits that such cases must be remanded for additional findings.

In all the circuits which have interpreted the effect of the omission of some or all findings required by Rule 52, all, except the Tenth, hold under the general authority of *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415, that such error requires remanding the case so that the trial court can supply the findings omitted.

While petitioner contends that the trial judge here made a finding of malice, if it was not made, Rule 52 required the Court of Appeals to remand the case for such a finding by the trial court, rather than make that finding itself without the benefit of seeing and hearing the witnesses themselves.

The necessity and correctness of the rule that prevails in all of the circuits but the Tenth is derived from Rule 52 itself. In the Rule it states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In this case the vital questions involve the motives and intent of the respondent and its agents, whether they acted fraudulently or with malice to deprive petitioner of the just fruits of his contract, of his efforts in originally accumulating the leases and of his attempt to save those leases by drilling after July 1, 1955. What Mr. Justice Jackson said in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, has particular bearing on petitioner's contention in this case:

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit

> given to witnesses by those who see and hear them."

This is the essence of Rule 52(a). Because of it, in order to set aside a finding that has been made by a trial court, the reviewing court must find that it is "clearly erroneous." In order to reach a decision that a finding is clearly erroneous the reviewing court must have a definite and firm conviction that a mistake has been committed. As Judge Sanborn stated in *Cleo Syrup Corp.* v. *Coca Cola Co.*, 139 F. 2d 416, 417; cert. den. 321 U.S. 781:

> "In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law."

Although a certain amount of documentary evidence, i.e., the instruments making up the contract, was involved in this case, the issue of malice could only be determined from the witnesses. There were 17 witnesses for petitioner and 8 witnesses for respondent on the issue of liability. It is unquestionable that their demeanor and apparent credibility had to be taken into consideration. The Court of Appeals could not have taken these important factors into consideration and therein lies the evil of the Tenth Circuit's departure from the other circuits in the United States.

### 2. Conflict Between the United States Supreme Court and the Tenth Circuit

In many of the cases cited in the preceding subsection as in conflict with the Tenth Circuit, the authority principally relied upon was *Kelley* v. *Everglades Drainage Dist.*, 319 U.S. 415. If the Tenth Circuit

decision does not conflict with this Court's *Everglades* decision *in fact*, it is certainly a conflict *in principle*.

*Everglades* was a bankruptcy case and does not interpret Rule 52 as such, but it lays down the rule as to findings of fact and the function of an appellate court as to them. This Court held: "it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make." (319 U.S. at 421) The case, which had been affirmed by the Fifth Circuit Court of Appeals was remanded by this Court to the District Court for "suitable findings."

Even had the Court of Appeals felt that the evidence would not justify the trial court finding favorably to petitioner, he had the right to have the essential fact found by the trial court. But, in its opinion (279 F. 2d at 444) the Court of Appeals said . . . . "the failure to withdraw the caveat . . . might have resulted in a slander of title . . . .", but the trial court did not include a finding as to the "essential ingredient of malice". In no part of the opinion does that court say there was no evidence of malice. The Everglades rule applies equally to Courts of Appeals, since on Certiorari from a Court of Appeals, the Supreme Court stands "in review in the same position as the Court of Appeals" in relation to the District Court's findings. *McAllister* v. *United States*, 348 U.S. 19, 20. The Everglades case, which had been affirmed by the Fifth Circuit Court of Appeals was remanded by this Court to the District Court for "suitable findings."

It is important for this Court to declare the correct application of Rule 52 and to do it expressly. In *Hatahley* v. *United States*, 351 U.S. 173, this Court remanded a Federal Tort Claims Act case before this

Court on a Writ of Certiorari to the Tenth Circuit. It was remanded for "appropriate findings" to the District Court. However, no discussion of Rule 52 was contained in the opinion and the Tenth Circuit apparently overlooked the import of this Court's refusal as an appellate court to review without necessary findings by the *trial court.*

Still another decision of this Court with which the Tenth Circuit is in conflict is *Panama Mail S.S. Co.* v. *Vargas*, 281 U.S. 670, in which the case was remanded to the trial court to supply omitted findings.

This Court has ruled more than once on Rule 52, but its decisions have never gone explicitly to the point involved here. In the *Yellow Cab Case*, quoted in the preceding subsection; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597; *United States* v. *E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 381; *United States* v. *Oregon State Medical Soc.*, 343 U.S. 326, 332; *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393 this Court was concerned primarily with the "clearly erroneous" standard to be applied in review of findings made under Rule 52. In this case, the Tenth Circuit, hearing decided that an essential finding had been omitted, undertook to make that finding itself and thereby overturned the decision of the trial court.

What the petitioner urges and what this Court has indicated by the Everglades decision and others is that a litigant in a nonjury case has the right to have the facts tried and decided by the trial court. This principle is analogous to the right to have a jury decide the fact questions in jury cases, a principle set forth by this Court in a variety of cases.

For example, this court in *Byrd* v. *Blue Ridge Rural Electric Co.*, 356 U.S. 525, held that the Court of Ap-

peals for the Fourth Circuit erred when it did not remand a case for a new trial and that the petitioner had been deprived of his opportunity, his "day in court", to present evidence against a defense which was not raised at the trial. The trial court had erroneously interpreted the South Carolina Workmen's Compensation statute and excluded an affirmative defense of respondent. The Court of Appeals reversed, holding that respondent was entitled to the affirmative defense and then that court found the defense to be proved from the record. The Supreme Court agreed with petitioner that he had been deprived of his right to come forward with proof of his own with regard to that defense at that stage of the proceedings, that is, in the trial court, and remanded the case to the District Court.

This Court's position in FELA cases on the plaintiff's statutory right to have a jury decide the factual questions, however limited, hinges on the same principle involved here. Petitioner realizes that FELA cases involve strictly statutory rights but the right to have facts tried at trial level is analogous. In those cases it is the jury, not the Court, that determines the facts. *Rogers* v. *Missouri P.R. Co.*, 352 U.S. 500, 504. Here in a non-jury civil action, under Rule 52 it is the trial court, not the appellate court, that tries the facts.

In a recent article in the Harvard Law Review (Vol. 73, No. 70, May, 1960) "Professor Hart's Theology", the Honorable Thurman Arnold at p. 1302 in discussing the Supreme Court and jury verdicts in negligence cases makes a point that petitioner believes applies equally to non-jury verdicts. Mr. Arnold explains:

> "When therefore the Supreme Court reviews a negligence case in order to compel *courts of ap-*

*peals to respect jury verdicts*, the Justices are doing far more than merely deciding an isolated evidentiary fact." (Emphasis added)

Petitioner submits that this is a novel question requiring the guidance of this Court, if Rule 52 is to continue to be interpreted in consonance with principles declared by this Court.

**3. Does Rule 52 Require Reversal of a Judgment in a Litigant's Favor, If He Fails to Object to the Omission of a Finding?**

In ruling upon the omission, in the eyes of the Court of Appeals, of a finding of malice by the trial court, the Court of Appeals for the Tenth Circuit embarked upon the novel view that petitioner, who was successful in the trial court, should have raised some objection to the purported omission. (279 F. 2d 436, 443) Petitioner, in his Petition for Rehearing, discussed this surprising aspect of the case at page 10 therein:

Petitioner's comments upon this error in its Petition for Rehearing below (pp. 10-11) apply to all Circuits and merit quotation here:

"The direction of entry of judgment in favor of the defendant will not only result in a great miscarriage of justice, but we submit that it involves a matter of extreme importance to successful litigants in the courts of this Circuit. In this connection, we are unable to understand the statement at page 21 of the opinion concerning the failure of Snakard to raise the question of the asserted omission before the lower court. In none of your former decisions in any of the above-mentioned cases, or in any of the cases from the other Circuits did the successful litigant raise or attempt to raise the omission. Neither this Court nor any of the other Circuits have held, to our knowledge, that such failure summarily required the rendi-

tion of a judgment against the successful party. If this is the meaning intended, then Your Honors have held directly contrary to the above cited decisions from this Circuit and also, directly contrary to the case of *Burkhard* v. *Burkhard*, 175 F. 2d 593, where there was an omission to make a finding but this Court held that the general judgment *implied a favorable finding* on the omitted issue.

"Such a construction or application of Rule 52 would cast an onerous burden on successful litigants and the trial courts of this Circuit. It would certainly be contrary to the generally accepted purpose of findings of fact as only being required to be sufficient to indicate the basis of the judgment; that all inferences are to be accorded findings which would support rather than strike down the general judgment, and would disrupt the settled law that an Appellate Court, will not, on disputed evidence undertake to make findings.

"It would in each instance, in this Circuit, require microscopic statement of fact in the findings, and if the trial court, although the matter were called to his attention by the successful litigant, did not see fit to make a correction, that successful litigant would then be in position of losing the case as that litigant could not appeal from the trial court's failure to include the findings he requested or changes requested [*Lindheimer* v. *Illinois Bell Telephone Co.*, 292 U.S. 151, 78 L. Ed. 1182; *Public Service Commission of the State of Missouri* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 83 L. Ed. 608; *Mach* v. *Abbott Co.* (8th Cir.), 136 F. 2d 7; *Automobile Insurance Co.* v. *Barnes-Manley Wet Wash Laundry Co.* (10th Cir.), 168 F. 2d 381; *Harding* v. *Federal National Bank*, 31 F. 2d 914; *Guaranty Co. of N. America* v. *Phenix Insurance Co.*, 124 Fed. 170]."[16]

[16] See also Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242.

That the view of the Tenth Circuit is completely wrong is demonstrated by Rule 52(b) which relieves a litigant of any obligation to object to or to move to amend findings before appealing. Furthermore, Rule 52(a) unequivocally states that requests for findings are not necessary for review. Why should a successful litigant be required to object to the omission of a finding when an unsuccessful litigant may obtain review even though he requested no findings he thinks should have been made?

**4. The Conflict Between the Tenth Circuit and the Supreme Court of Oklahoma**

In reaching its decision in this case, the Tenth Circuit came into direct conflict with the Supreme Court of Oklahoma on a question of substantive Oklahoma Law. One of petitioner's causes of action was the tort of slander of title. The Court of Appeals correctly stated at page 443 of 279 F. 2d 436 that: "The Oklahoma rule is that the principal element in a suit for slander of title is malice," and that the question of malice under Oklahoma cases is for the trier of the facts. But having reached this point, the Tenth Circuit departed from the law as established by the Oklahoma Supreme Court and came into conflict with that court in two respects.

First, after ruling, as mentioned above, that malice is a question for the "trier of the facts", the Court of Appeals failed to leave that question to the trial court either by accepting the plain meaning of the trial court's findings and conclusions, or by giving the proper inference that a general finding for plaintiff in a slander of title action amounts to a finding of malice, *Wilkerson* v. *Wasson*, 235 P. 206, or, having decided

that there was no malice finding, by remanding the question to the trier of facts.

Secondly, the Tenth Circuit, by finding against petitioner on the question of malice, came into direct conflict with the Oklahoma Supreme Court by failing to apply a controlling Oklahoma statute, 12 O.S.A., Section 1445, to this case.

Section 1445 reads:

> "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

This section was specifically held to be applicable to slander of title actions by *Kingkade* v. *Plummer*, 111 Okla. 197, 239 P. 628. Therefore, the petitioner having proved the caveat filed by respondent was false and injurious and the trial court having found (and so stated in its conclusions of law) that the caveat was an unwarranted claim of a 7/8ths interest in the leases, a "deliberate, unjustified assertion of interest" by respondent, the petitioner was entitled to, and accorded by the trial court, a presumption of malice in his favor. Under the Oklahoma Supreme Court decisions interpreting Section 1445, upon petitioner's showing, which the trial court approved in its conclusions, that the filing of the caveat was unjustified and unwarranted, the statutory presumption arose and fully supports the trial court's judgment. *New England Oil & Pipe Line Co.* v. *Rogers*, 7 P. 2d 628; *Kingkade* v. *Plummer*, 111 Okla. 197; *Wilkerson* v. *Wasson*, 235 P. 206. The New England case states the Oklahoma rule with which the Tenth Circuit is in conflict:

> "The general rule is that, if plaintiff can show the publication was false in any material respect,

and he can also show special damages to himself, malice will be presumed, and a *prima facie* case of malice will be made. *Malice will be implied or inferred from the facts and circumstances of the case as they are ascertained to exist* * * * " (Emphasis added.)

**5. The Court of Appeals Must Apply the Law of Oklahoma in Determining Whether Respondent Breached Its Fiduciary Duties to Petitioner**

The Court of Appeals agreed with the District Court that the parties hereto were in fiduciary relation to each other, under Oklahoma law. Having made this bow to the laws of that great state, the Tenth Circuit then wrote its own law to describe the duties of that relation. According to the Tenth Circuit, a fiducial relation is just another contract, no more, no less. It held that the only fiducial duties were those spelled out in the contract between the parties.

In stating its view of the law the finding of fiducial duties, the Tenth Circuit cited *Holmes* v. *Keets*, D. C. Cir., 153 F. 2d 132, 133, and footnote No. 3 to *Champlin* v. *C.I.R.*, 10th Cir., 71 F. 2d 23, 27. The first case, of course, does not enunciate Oklahoma law and thereby violates the Erie doctrine. The second case, or rather, footnote, discusses only the question of existence of a partnership and not the duties therein involved. But be that as it may, in the *Holmes* case, the defendant owned an hotel. Plaintiff knew this before entering into a partnership with him for another hotel. The defendant added 25 rooms to his own hotel and plaintiff sued to recover a share of the profits, alleging that the building of the addition was in conflict with the partnership agreement. The D. C. Court of Appeals held that since the plaintiff had knowledge of the defendant's competitive position when he entered the con-

tract he was not entitled to presume that the partnership extended to that other hotel, nor was he entitled to share in the profits therefrom. This case did not raise a question of fiducial duty but was an inquiry into subject matter of the partnership. Clearly, that case has no applicability to this case.

Such is not the law of Oklahoma. This is. Joint venturers are fiduciaries and owe each other the utmost good faith. *Dyke* v. *Martin*, 204 P. 1106; *Martin* v. *Clem*, 280 P. 2d 826; *Knapp* v. *First National Bk. & Trust Co.*, 154 F. 2d 395 (C.A. 10). Joint venture contracts and activities are governed by the law of partnership. *Taylor* v. *Brindley*, 164 F. 2d 235; *Boles* v. *Beekers*, 244 P. 182. Section 10, Title 54, O.S.A. provided that partners must treat each other with "highest good faith", and the "slightest concealment, misrepresentation, threat or adverse pressure" is prohibited. In Oklahoma, statutes and decisions existing at the time of a contract are incorporated in it. *Oklahoma Cotton Growers Assoc.* v. *Salyer*, 114 Okla. 77, 243 P. 232; *Allied Reserve Life Ins. Co.* v. *Cragg*, 31 Oklahoma Bar Journal 1226.

Respondent treated its fiduciary like this:

(A) Filed the caveat wrongfully asserting seven-eighths interest in all of the leases and thus claimed adversely three-fourths of Snakard's one-half interest.

(B) Took a series of steps (Finding No. 11) calculated to force Snakard to accept a farm out with Inland Oil Company, referred to as Frankfort's "district office" whereby Snakard's interest would be further reduced.

(C) Represented that it was going to drill all of the block (Finding Nos. 13, 15). It now claims it never had such intention.

(D) Obtained extensive seismic information and other geological data which conclusively showed that the prolific Second Wilcox structure extended south rather than northeast (Finding No. 16).

(E) Charged the cost of some of this geological information to Snakard, but did not reveal to him the geological and subsurface information it had critical to the specific area (Finding No. 18).

(F) Repeatedly represented that the structure lay to the north and east and that there would be considerable risk in drilling a well to the south (Finding No. 19).

(G) Commenced drilling to the north and east and continued to misrepresent and falsely reported the Erwin No. 2 Well as a producer when it was dry in the Second Wilcox and violated the Oklahoma law in producing oil from the Erwin No. 1 and stating to the Oklahoma Corporation Commission that it was coming from the Erwin No. 2 (Findings Nos. 20, 21);

(H) Although advised by its attorney to release any leases it was not going to drill (Finding No. 24) it never did tell Snakard that it was not going to drill the Thomas and Christian leases and did not drill them, but attempted until the last minute to force him into the farmout with Inland Oil Company.

(I) When it did not drill the Thomas, Christian and Simpson leases it refused to release the seven-eighths interest claimed by the caveat in such leases and attempted to block Snakard's drilling efforts on these leases by action before the Corporation Commission, after its interest in these leases had expired.

(J) Deliberately and unjustifiedly clouded Snakard's title to the undrilled leases which prevented him

from taking action to save them (Concl. No. 5), and unwarrantedly clouded Snakard's title by the caveat which it had placed of record (Concl. No. 6).

The trial judge, applying the Oklahoma requirement of the "utmost good faith" and the Oklahoma prohibition against the "slightest concealment, misrepresentation, threat or adverse pressure" to this joint venture, reach the only logical and just conclusion that could be derived from the enumerated facts. He concluded that "Frankfort breached its fiducial duty" to petitioner (Concl. No. 6). If the Court of Appeals had applied this Oklahoma law, it could not have reached a different conclusion.

**6. Court of Appeals Should Have Affirmed Judgment for Petitioner or Remanded for Additional Findings, Even If No Malice Was Proved or Found**

In Paragraph (4) of his Amendment to Amended Complaint (T.R. 85), petitioner charged:

(4) ". . . The filing of record of said caveat clouded title to the oil and gas leases covering the lands described therein upon which no wells had been drilled before the expiration of said leases. The first three named defendants wrongfully refused to release said caveat of record as to the leases upon which no wells had been drilled, which wrongful refusal obstructed and prevented the drilling of oil and gas wells thereon by others, from which the plaintiff would have made a substantial profit, *all of which actions constituted a tort* entitling the plaintiff to recover for all damages occasioned thereby." (Emphasis added)

In *Mangum Electric* v. *Border*, 222 P. 1002, the Oklahoma Supreme Court defined the tort of "malicious wrong" in the Syllabic:

3. "The intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another, or that other persons property or trade is actionable, if done without just cause or excuse, such intentional action when done without just cause or excuse is what the law calls a "malicious wrong",

4. "Any intentional act which in the ordinary course will infringe upon the right of another to his damage is wrongful, except it be done in the exercise of an equal or superior right."

Facts have been set out above in this petition and are supported by the trial record that:

a. Petitioner hired a drilling contractor, Bradley, to drill the Thomas and Christian leases after July 1, 1955. (T.R. 160, 249).

b. Bradley was forced to cease operations, causing the leases to be lost, because the caveat was intentionally left on file, "without just cause or excuse," thus preventing either Bradley or petitioner from obtaining money needed operate. (T.R. 253, 255).

c. Money would have been invested if the Caveat had been withdrawn. (T.R. 255, 278).

d. Respondent refused to withdraw the Caveat, even though advised to do so by it's attorney (T.R. 439) and asked to do so by the petitioner. (T.R. 161-2).

This Court in *Weade* v. *Dickmann, Wright & Pugh*, 337 U.S. 801, 809, held that a Court of Appeals which had reversed a verdict for plaintiff and remanded with directions to enter a judgment for defendant, because

plaintiff could not recover from defendant as a common carrier, may not direct entry of a judgment for defendant when the pleadings suggested and the evidence alleged defendant's liability by reason of negligence. The case was remanded for further trial of the facts.

The rule of the Weade case is plainly applicable here. The Tenth Circuit did not consider the tort of "malicious wrong" after it decided that the tort of slander of title did not exist in the absence of a trial court finding of malice. The elements of "malicious wrong" as defined in the Mangum case, *supra*, are:

1. an intentional act
2. intended to damage
3. and which, in fact, damages
4. a person, his property, or his trade
5. without just cause or excuse

No malice is necessary. The absence of "just cause or excuse" completes the tort. Having decided that no malice was found by the trial court, the Tenth Circuit could and should have affirmed the trial court's judgment on the basis of this second alleged and proved tort, or, at least, should have remanded to the trial court for new findings or for further proceedings, as was done in the Weade case, *supra*.

The principle underlying this Court's position in the Weade case, that a litigant has a right to his day in court. Petitioner alleged several bases for respondent's liability in the trial court. Whether the trial approved or excluded any one of these must be gleaned from the findings. If the Court of Appeals was in doubt as to whether the trial judge found a "malicious

wrong" to have been committed, it should have allowed the trial court the opportunity to speak specifically, just as it was required to have the trial court find the presence or lack of malice as to the tort of slander of title.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, and this Court should direct the Court of Appeals to reinstate the judgment of the District Court or, in the alternative this Court should remand this case to permit the District Court to make specific findings on such matters as the Court of Appeals found lacking.

Respectfully submitted,

PEYTON FORD
1000 Connecticut Ave., N. W.
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*

FORD, LARSON, GREENE
AND HORAN
Washington, D. C.

JOHN B. DUDLEY, JR.
DUDLEY, DUDLEY & DUDLEY
Oklahoma City, Oklahoma

CLYDE J. WATTS
LOONEY, WATTS, LOONEY
& NICHOLS
Oklahoma City, Oklahoma

P. D. ERWIN
Chandler, Oklahoma

## APPENDIX A

### Findings of Fact and Conclusions of Law

FINDINGS OF FACT

1. On November 11, 1954, plaintiff Snakard contracted with defendant Frankfort Oil Company through written instruments identified as Exhibits "A", "B", "C", "D", "E", and "F" (attached to original complaint). In consideration of $1.00 per acre, plaintiff agreed to assign unto defendant a one half interest in 1280 acres of leases plaintiff held in the North Wellston Pool and to pay one-half of the cost relating to title examinations and curative measures. These joint leases are specifically described as all of Section 35 and the SW 4 of Section 36 in Township 15N, Range 2E; and, the W 2 of Section 2 and the NE 4 of Section 3, Township 14N, Range 2E, Lincoln County, Oklahoma.

2. Under this agreement defendant was to have a test well drilled upon the leasehold block to the Arbuckle formation. The drilling contract was made to plaintiff and provided for payment at the rate of $8.00 per foot; this per foot contract was considerably higher than the customary drilling cost in the area and was given to enable plaintiff to make a profit of approximately $25,000 per well completion.

3. After the first well, each party to the contract was at liberty to elect whether he or it would drill an additional well or wells, and each party was required to designate whether or not he or it would participate in any well drilled by the other. Each participating party was obligated to pay one-half of the cost thereof and was to receive one half of the production proceeds.

If defendant chose not to participate, its interest in the well was lost. If plaintiff chose not to participate, the defendant became the owner of the entire working interest in the well and plaintiff owned no interest in the production

until such time as defendant received 200% of the amount which plaintiff would have paid for his one-half of the cost and expense, had he participated. During the time plaintiff held this 1/8th of the working interest he was to pay 1/8th of the operating expense. When the defendant received this 200%, the plaintiff then was to again own one-half of the working interest production; and, at such time plaintiff was to pay one-half of the operating cost.

4. Defendant had the right of 'first' refusal to purchase all or any portion of plaintiff's interest which plaintiff wished to sell and on which plaintiff had a bona fide offer of purchase.

5. A number of the assigned leases contained drilling clauses. Defendant was entitled to comply with any of the drilling clauses it so chose and the provisions in the letter agreement applied to financing plaintiff's part of the expense.

6. The exploration well, the Stanolind No. 1, was drilled to the Arbuckle limestone. Because of water, the well was abandoned. However, tests of this well indicated that there was a prolific second Wilcox pool in the area.

7. At about the time the first well, the Stanolind No. 1, was completed, plaintiff was sued in the District Court of Lincoln County, Oklahoma, by Gordon Burdett, who alleged that he and Snaicard had entered into a joint venture concerning the production of these leases and that he was entitled to one-half of plaintiff's proceeds from this transaction with the defendant. When this well was completed, the defendant paid plaintiff an amount of money sufficient to meet plaintiff's obligation to the drilling contractor, but withheld the remainder pending the termination of the Burdett litigation.

8. During January of 1955, defendant contracted with Inland Oil Company to operate this lease block.

9. The Erwin No. 1 well was completed in the SW 4 of SW 4 of Section 35 on or about February 24, 1955, as a splendid second Wilcox producer.

10. Shortly after the completion of the Erwin No. 1 well, Pres Cochran, Inland's president, offered plaintiff $100,000.00 for plaintiff's interest in the entire lease block.

When plaintiff refused to sell, Cochran and his geologist, Roy Carmach, made a trip to Bartlesville, Oklahoma, and displayed to Ray Shaffer, defendant's general manager, a sub-surface geological map, which showed that the top of the second Wilcox structure extended onto the Thomas lease in the NW 4 of Section 2, 14N-2 W, and made a deal with Shaffer to give to Inland a farm-out whereby in return for drilling a well, Inland would be given one-half interest in certain parts of the lease.

11. Thereafter, the defendant took a series of steps calculated to persuade or require plaintiff to accept the farm-out proposal with Inland. These steps continued through March, April, May and June of 1955.

12. On March 8, 1955, immediately after the completion of the Erwin No. 1, defendant, pursuant to advice of counsel, filed with the County Clerk of Lincoln County the caveat set forth in plaintiff's complaint which described the property covered by the contract between plaintiff and defendant. This caveat referred to the contract between the parties, recited that the contract provided for the sale and transfer from plaintiff to defendant of an undivided ⅛ interest in and to the leases then owned and thereafter acquired by plaintiff, notified the public that defendant had performed its contractual terms and was the owner of an undivided ⅛ interest in and to said leases, and warned that any party purchasing any interest in the leases did so at his own risk or peril.

13. On April 8, 1955, defendant wrote plaintiff regarding the eight wells which had not been drilled or commenced

on the basic leases at that time. This letter indicated that defendant had elected to drill the eight remaining wells in the block, and requested plaintiff to make his election as to whether "to participate or be a non participating member" under their Joint Operating Contract.

14. On April 15, 1955, Snakard, by letter, agreed to be a non-participating party. The defendant did not respond to plaintiff's letter of election.

15. On April 18, 1955, Frankfort's attorney and active representative wrote in part:

"It must be understood that Mr. Snakard will execute assignments in the future to each of the various leases as we start wells on them.

"We want to go ahead and get all of these properties drilled up by the July deadline and it is going to require the expenditure of tremendous sums of money * * *

"The matter has been pending entirely too long and with the July deadline for drilling many additional wells * * *"

16. During April and May of 1955, defendant procured extensive seismic information, together with other geological data; this information conclusively showed that the top of the highly prolific second Wilcox structure, on which the Erwin No. 1 and Meadors Estate No. 1 wells had been completed, extended toward the southeast in the Thomas lease, and, such structure also extended somewhat into the Christian lease in the NE 4 of Sec. 2 14N 2E.

17. Frankfort's exploration manager, Mr. Caswell, in a report to Frankfort's management on April 1, 1955, stated that in his opinion a forty acre location on this second Wilcox structure had a potential production of two million barrels of oil, and that the two locations to the south of the Erwin No. 1 were about as sure as you could have for second Wilcox production.

18. At no time did the defendant disclose to plaintiff the pertinent geological and sub-surface information it had critical to this specific area. The acquisition cost of some of this data was charged to plaintiff.

19. The defendant repeatedly represented to plaintiff that the producing structure lay to the north and east of the Erwin No. 1 and Meadors Estate No. 1 wells, and that there would be considerable risk in drilling a well on the Thomas lease.

20. In drilling sequence, defendant moved north and east from the Erwin No. 1 well and drilled the Magnolia No. 1 well which was dry in the second Wilcox and was completed as a shut in gas well in the Oswego. Thereafter, the defendant moved northward and drilled the Clark No. 1 and Nitner No. 2 in the SW 4 of NE 4 and SE 4 of NE 4 of Section 35, respectively. These two wells were dry in the second Wilcox and completed as shut in gas wells in the Oswego. On May 29, 1955, Frankfort commenced the Erwin No. 2 as a north offset to the No. 1 Erwin, at a time when this lease was already held by the No. 1 Erwin.

21. The Erwin No. 2 was dry in the second Wilcox, then plugged back to the Oswego and reported as a second Wilcox producer. Moreover, the Erwin No. 2 was credited with full production from the second Wilcox when in fact it was actually run from the Erwin No. 1. On June 7, 1955, Frankfort started the Amerada State [illegible] NE 4 of NW 4, a diagonal offset to the northeast of the Erwin No. 2, and an offset to the West of the Clark No. 1.

22. Between March 1 and June 28, 1955, the defendant drilled five wells to the north of the Erwin No. 1 and the Meadors Estate No. 1, none of which were productive in the second Wilcox. These wells were drilled in spite of the seismic and other geological data that indicated that the second Wilcox high was to the south of the Erwin No. 1 and the Meadors Estate No. 1, and that the [illegible] to the north was a separate structure [illegible]

23. Plaintiff assigned to defendant a one-half interest in each lease on which defendant drilled a well; however, the defendant received no such assignment as to the undeveloped leases.

24. Defendant was advised by its attorney that if any or all of the basic leases were not going to be drilled by [illegible] that those not drilled should be released to plaintiff within a reasonable time prior to July 1, 1955, so that plaintiff could effectively deal with such leases.

25. On June 29, 1955, defendant advised plaintiff that it released any claim it might have as to the Lee lease (SW 4 of Section 36) and the Simpson lease (SW 4 of Section 2) stating by letter that since Snakard had not executed assignments covering the leases, no further action would be required on defendant's part and again requested plaintiff to join in the farm-out agreement to Inland.

26. On July 1, 1955, the plaintiff, without notice to defendant, commenced drilling operations upon the Thomas tract (NW 4 of Section 2).

27. Defendant did not later acquire any interest in the expired Mansfield, Christian, Thomas, Simpson or Lee leases.

28. Plaintiff substantially performed all obligations resting upon him under the contract with defendant.

Conclusions of Law

1. The written instruments attached to the original complaint and identified as Exhibits "A", "B", "C", "D", "E", and "F", should be construed together as the contract between the parties.

2. These instruments created a joint venture status and a fiduciary relationship between plaintiff and defendant Frankfort.

3. When executed, the agreement only placed upon the defendant an absolute duty to drill one well. However,

the contract gave each of the parties an option to elect to drill additional wells in the involved block.

4. The defendant elected to drill the remaining undeveloped leases and in then failing so to do breached its contractual agreement with plaintiff.

Defendant's election is pointed up by the caveat filing of March 8, 1955, since defendant could only have made a claim to the entire 7/8ths if it drilled such leases and if the plaintiff were a non participating partner. In addition, defendant's letter of April 8, 1955, requested plaintiff to elect whether he would be a participating or non participating partner. On April 15th, plaintiff, by letter, indicated he would be a non participating partner.

5. If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of the leases prior to their expiration, a right plaintiff held under the terms of the contract.

Whether defendant improperly clouded plaintiff's title to coerce plaintiff into approving the controverted farmout, or for some other reason not apparent in the record is immaterial. This was an act contrary to defendant's rights under the agreement and encroached upon plaintiff's contractual rights, separate and apart from the fiduciary relationship.

6. Moreover, defendant Frankfort breached it's fiduciary duty owed plaintiff by failing to fairly and openly reveal the geological information it possessed directly bearing on the agreement's subject matter, by overreaching plaintiff in connection with the proposed farmout to Inland in affirmatively misrepresenting the location of the Second Wilcox producing structure, and by unwarrantedly claiming a 7/8ths interest in this lease block through the caveat filed of record on March 8, 1955.

7. Plaintiff is entitled to any damages from defendant Frankfort which directly flowed from the defendant's breaches referred to above.

An additional hearing will take place limited exclusively to the issue of damages.

Dated this 27th day of May, 1958.

W. R. Wallace
United States District Judge

Filed May 27, 1958.

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United States District Court
for the
Eastern, Northern and Western Districts of Oklahoma

R. W. Wallace, Judge — Oklahoma City 1

July 10, 1958

Messrs. Robinson, Shipp, Robinson and Barnes, Hightower Building, Oklahoma City 2, Oklahoma. Mr. P. D. Erwin, Attorney, Chandler, Oklahoma. Messrs. Looney, Watts and Looney, First National Building, Oklahoma City, Oklahoma. Messrs. Dudley, Dudley and Dudley, First National Building, Oklahoma City, Oklahoma.

Re: Snakard vs. Frankfort Oil Company, a division of Carstairs Bros. et al., No. 6931 Civil W. D. Okla.

Gentlemen: The plaintiff is entitled to recover those damages which can be shown with a reasonable degree of certainty resulted from defendant's breach of contract.

The court will not make an award based upon speculation or conjecture. If the plaintiff can establish with the required certainty the amount of oil which would have been produced had the defendant performed its obligations, and demonstrate the cost of drilling and production, the court can then allow the defendant the credits to which it is entitled under the agreement, and arrive at a figure which

represents the actual loss suffered by plaintiff. Naturally, the defendant will be entitled to offset any amount or amounts shown to have been received by plaintiff, if any, as a result of his attempted mitigation of damages.

If the plaintiff cannot establish with reasonable certainty the likely production and expense in connection therewith, the court will make an award which under all the evidence produced by both sides most nearly represents the monetary loss sustained by the plaintiff.

Very truly yours,

W. R. Wallace

Filed July 22, 1958.

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United States District Court
for the
Eastern, Northern and Western Districts of Oklahoma

W. R. Wallace, Oklahoma City, Judge

December 30, 1958

Messrs. Looney, Watts, Looney & Nichols, Attorneys, First National Building, Oklahoma City, Oklahoma. Messrs. Dudley, Dudley & Dudley, Attorneys, Liberty Bank Building, Oklahoma City, Oklahoma. Messrs. Robinson, Shipp, Robertson & Barnes, Attorneys, Hightower Building, Oklahoma City, Oklahoma.

Re: Snakard vs. Frankfort Oil, No. 3931 Civil, W. D. Oklahoma.

Gentlemen: The court has considered [illegible] features of defendant's witness, Mr. [illegible] on defendant's exhibit 28 as probably [illegible] gross barrels of recovery reasonably to be anticipated from the controverted leases. Such gross recovery [illegible] 1,070,000 barrels. From this gross recovery Mr. [illegible]

calculates that the total annual net income in dollars to the plaintiff would have been $1,493,277.00.

The court is of the opinion that the plaintiff is entitled to judgment against the defendant for $1,493,277.00. This figure best represents the amount of damage suffered by the plaintiff as a direct result of the defendant's misconduct.

The court will not apply any discount figure to this just mentioned net income total. Under all the evidence, including the plaintiff's loss of depletion allowance and other tax loss the amount of any reasonable discount figure is more than offset.

In addition, the court specifically finds that the evidence does establish with reasonable certainty the monetary damage in question to the plaintiff; that a discount factor should not be applied under the instant facts; and that the defendant is not entitled to any credit for interests held by Dr. Devine, C. D. Snakard and J. N. Snakard, since all the evidence indicates that the plaintiff has no interest, secret or otherwise, in such properties.

Moreover, the plaintiff took all reasonable steps to mitigate his damages caused by the defendant and the defendant is not entitled to any credit or offset for an alleged failure by plaintiff to properly mitigate his own damages.

Within seven days counsel should prepare for the court's signature findings of fact and conclusions of law which conform with this letter as to the damage feature of this suit, together with a final written judgment which reflects the court's rulings on both liability and damages.

Very truly yours,

W. R. Wallace

Filed December 31, 1958.

## Findings of Fact and Conclusions of Law

This cause being heard before the Honorable W. R. Wallace, U. S. District Judge on July 14, 1958, upon the sole issue of the amount of recovery to which the plaintiff may be entitled, by reason of loss of oil and gas leases involved in this cause and occasioned by acts and omissions of the defendants, as reflected by Findings of Fact and Conclusions of Law heretofore entered in this cause upon the issues of liability and measure of damages; and the Court, having heard testimony offered by the respective parties, and having considered Briefs by counsel for plaintiff and defendants, and being fully advised, now enters these additional Findings of Fact and Conclusions of Law as follows:

1) On July 15, 1957, this cause was heard before the Court upon the issue of liability, if any, of defendants to plaintiff, evidence was offered by the respective parties, and the cause submitted on Briefs; and, on May 27, 1958, the Court entered its written Findings of Fact and Conclusions of Law, which are hereby referred to and incorporated as part of the Findings of Fact and Conclusions of Law in this cause, as applicable to the issue of liability of the defendants to plaintiff.

2) Pursuant to regular setting, this cause was heard on further Pre-Trial by the Court on June 18, 1958, at which time, the issue of measure of damages was presented to the Court by plaintiff and defendants; and, upon direction of the Court, Briefs were submitted by the respective parties. On July 10, 1958, the Court entered its memorandum opinion as to the measure of damages sustained by plaintiff because of the loss of plaintiff's oil and gas leases involved herein, it being held by the Court, as follows:

a) Plaintiff is entitled to recover those damages which can be shown with reasonable degree of certainty resulting from defendant's breach of contract.

b) If plaintiff can establish with the required certainty the amount of oil which would have been produced had the defendants performed its obligations and demonstrate the cost of drilling and production, the Court then can allow the defendants the credits to which it is entitled under the agreement, and arrive at a figure which represents the actual loss suffered by plaintiff.

3) On July 14, 1958, this cause was heard upon the issue of plaintiff's recovery. Evidence was offered by the respective parties, and the cause sul itted to the Court upon Briefs; and, after consideration of t > evidence and Briefs, the Court finds as follows:

a) Under date of December 30, 1958, the Court entered a memorandum decision fixing the amount of loss sustained by plaintiff at $1,493,277.00, which memorandum opinion is incorporated herein by reference; and, pursuant to such opinion, the Court further finds as follows:

1) It has been established with a reasonable degree of certainty that, had the leases that were lost by the plaintiff as a result of the acts and omissions of the defendants been operated to final conclusion, and exhaustion of the productive capacity of the leases, they would have produced a total of recoverable oil amounting to 1,979,800 barrels.

2) That by reason of the foregoing, plaintiff has been damaged in the sum of $1,493,277.00.

b) The Court finds that, in arriving at the net loss of plaintiff, the Court has taken into consideration the present value, net to plaintiff, of the loss sustained by plaintiff; and that, under all of the facts and circumstances before the Court in this case, no other discount factors should properly be allowable, and that it would be inequitable to allow any additional discount factor that would reduce

the present net amount of plaintiff's loss below the figure above set forth.

c) The Court finds that the plaintiff exercised proper and reasonable effort to mitigate his damage; and that the interests in the leases which were lost by the plaintiff that are now held by Dr. Devine, C. D. Snakard and J. N. Snakard were acquired by these parties through the efforts of the plaintiff to mitigate his damage, and plaintiff has no interest, secret or otherwise in such properties. Defendants are not entitled to any credit or offset as against the net figure of plaintiff's loss above set forth.

## Conclusions of Law

Under and pursuant to the Findings of Fact above set forth and referred to, the Court makes Conclusions of Law as follows:

1) The Court has jurisdiction of the parties and subject matter involved herein.

2) The defendants are liable to plaintiff for all reasonable damage sustained by plaintiff, under and pursuant to conclusions of law heretofore entered by this Court under date of May 27, 1958, and made part hereof by reference.

3) By reasons of the acts and omissions of the defendants set forth in the Court's Findings of Fact and Conclusions of Law dated May 27, 1958, plaintiff is entitled to recover from defendants a net sum of $1,943,277.00, and all costs of this action, which has been proved by plaintiff with reasonable certainty.

4) Plaintiff has exercised reasonable and proper efforts to mitigate his damages; and now holds no interest, secret or otherwise, in the properties that have been lost, as above set forth, due to the acts and omissions of defendants.

5) Judgment shall be entered in favor of plaintiff and against the defendants under the date of these Findings of Fact and Conclusions of Law.

Dated January 6th, 1959.

W. R. Wallace
U. S. District Judge

Approved, John B. Dudley, Jr., Att'y for plaintiff. Approved as to Form, T. Murray Robinson, Leon Shipp, Attorneys for defendants.

Filed January 6, 1959.

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**Journal Entry of Judgment**

This cause being heard on January 6th, 1959; and it appearing that the Court has heretofore entered its Findings of Fact and Conclusions of Law covering all issues in this cause; and that plaintiff is entitled to judgment against the defendants in the amount hereafter set forth.

It is Therefore Ordered, Adjudged And Decreed that plaintiff have and recover judgment against the defendants in the sum of One Million, Four Hundred Ninety-Three Thousand, Two Hundred Seventy-Seven Dollars ($1,493,277.00), with interest according to law and all costs of this action.

W. R. Wallace
U. S. District Judge

Filed January 6, 1959.

## APPENDIX B

FRANKFORT OIL COMPANY, a Division of Carstairs Bros. Distilling Company, Inc., a foreign corporation, *Appellant*,

v.

W. F. SNAKARD, *Appellee*.

No. 6114

United States Court of Appeals
Tenth Circuit

May 18, 1960

Rehearing Denied July 21, 1960

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Before HUXMAN, PICKETT and BREITENSTEIN, Circuit Judges.

BREITENSTEIN, Circuit Judge.

Appellee-plaintiff Snakard recovered judgment against appellant-defendant Frankfort Oil Company in the amount of $1,493,277 as damages arising from the alleged misconduct of Frankfort in connection with certain transactions between the parties pertaining to Oklahoma oil and gas properties. Jurisdiction is based upon diversity.

[1] The complaint in the court below contained two counts, the first alleging breach of contract and tort and the second charging conspiracy. There were seven defendants, one of whom, Frankfort, asserted a counterclaim against Snakard. The record as filed in this court did not show disposition of all of the claims or as to all of the defendants, and there was no compliance with Rule 54(b), F.R. Civ.P., 28 U.S.C.A., relating to judgments on multiple claims. Because of doubt as to whether the record presented an appealable judgment,[1] we ordered that the parties

[1] United States v. Martin, 10 Cir., 267 F. 2d 764, 772.

show cause as to why the appeal should not be dismissed. In response the parties filed a stipulation establishing the disposition or abandonment of all claims except those asserted against Frankfort in the first count of the complaint. This stipulation will be considered as a supplemental record in the case.[2] The issue for determination is the liability of Frankfort under the first count.[3]

Snakard held 13 leases covering 12 tracts of land with a total area of 1,280 acres in Lincoln County, Oklahoma. These leases were for a period of one year with no provision for delay rental and required drilling on or before July 1, 1955, to extend their terms.

On November 11, 1954, Snakard entered into four different but related contracts with Frankfort covering the 1,280-acre block. In substance, Snakard agreed to assign to Frankfort a one-half interest at $1 per acre and to take care of certain title clearance matters with Frankfort to participate in the cost thereof. Snakard contracted to drill a well, later known as Stanolind No. 1, at an agreed location on the block, to a depth adequate to test the Arbuckle formation. For the drilling of this well Frankfort was to pay Snakard a sum considerably higher than is customarily paid in the area. The purpose of the increased payment was to give Snakard a profit of approximately $20,000 for lease acquisitions. If production was obtained, Frankfort was to be the operator of the block under a joint operating contract.

The Stanolind No. 1 well was drilled in January, 1955, to its maximum depth and secured production in the second Wilcox sand, but because of water trouble and mechanical difficulties it was not completed as a commercial producer. Two other wells, the Erwin No. 1 and the Meador's Estate

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[2] See Rule 75(h), F.R. Civ. P.

[3] A cross-appeal No. 6115, Snakard v. Frankfort Oil Company, was dismissed on motion of cross-appellant at the time of oral argument. The issue in the cross-appeal was the alleged inadequacy of the judgment.

No. 1, were completed in February and April, 1955, and secured oil production in the second Wilcox sand. In the period March to June, inclusive, 1955, five other wells were drilled.[4] None of these obtained oil production but some were completed as shut-in gas wells.

By the middle of June, 1955, Frankfort had drilled on seven of the tracks. On June 20 Frankfort notified Snakard that it would make no effort to validate the Lee and Simpson leases. Without notice to Frankfort, Snakard, on July 1, 1955, commenced drilling on the Christian and Thomas leases in an attempt to validate them. On the Christian lease he withdrew and did not complete a well. Snakard had financial difficulties and became involved in a lawsuit questioning the continuity of his drilling on the Thomas lease. As a result he lost his interest in the Thomas lease.

Between July 1, 1955, and July, 1958, three commercial oil wells were developed by other parties on the Christian lease, six on the Thomas, and one on the Simpson. The basis for the claim of damages is the loss to Snakard resulting from the lack of validation of the Christian, Thomas, and Simpson leases.

Snakard contends that Frankfort breached its contractual obligations by not drilling on all the leases before the termination thereof. As production was secured, the operating agreement became effective. Therein, Frankfort was made the operator of the jointly-held leases. Under the agreement, if either party desires to drill a well he shall give notice to the other party who shall then have 10 days within which to elect to participate. If the election is to participate, then the "Operator [Frankfort] shall drill such well for the Joint Account and at the joint cost of the parties, and such well shall for all purposes be a jointly-owned well." If the election is not to participate, then "the party desiring to drill may nevertheless drill, complete and equip the well at its own cost and expense." The

[4] The Magnolia No. 1, Clark No. 1, Nitner No. 1, Erwin No. 2, and Amerada-Stanolind.

operating agreement is on a printed form which provides that as to any well not drilled for the Joint Account the participating party shall have entire ownership. This was modified to provide that if Snakard is a non-participating party on any well Frankfort should have a ⅞ working interest and Snakard a ⅛ working interest until Frankfort, out of ⅜ of the working interest, shall have reimbursed itself in a sum equal to 200% of ½ of the well cost. Thereafter, Frankfort and Snakard should each have ½ of the working interest.

Admittedly, Frankfort was obligated to drill one well.[5] The trial court so held but went on to decide that Frankfort "elected to drill the remaining undeveloped leases and in then failing so to do breached its contractual agreement with plaintiff."

Election to drill is said to result from Frankfort's April 8, 1955, letter to Snakard which read in part: "* * * there are eight drilling commitments remaining in said tract and you are hereby notified so that you may make your election. Further, that Frankfort intends to contract this work on the basis as the previously drilled wells in said tract, or to farm out some of the commitments, whichever is the more practical." If this letter was intended as a notice of desire to drill it was defective as the operating agreement required such notice to state the depth to which the well was to be drilled and the location thereof, and such statements were not made.

Further, it is urged that an election to drill resulted from a so-called caveat filed by Frankfort for record in the office of the county clerk of Lincoln County, Oklahoma, on March 8, 1955. At that time Snakard had not executed all of the lease assignments to which Frankfort was entitled. Previously, the relations between the parties had become strained because Frankfort had refused to pay Snakard the sums due in excess of the actual drilling costs

[5] The Stanolind No. 1.

of the Stanolind No. 1 well and also refused to pay certain title correction expenses incurred by Snakard. The Frankfort refusal to pay resulted from a suit filed in December, 1954, by one Burkett against Snakard. Burkett asserted an ownership of a one-half interest in the leases included in the Frankfort-Snakard tranctions.[6]

The caveat refers to the Frankfort-Snakard contracts, describes the land covered by the leases, and states:

> "Now, Therefore, the undersigned Frankfort Oil Company * * * does hereby notify the world that it has performed all of the terms of said contract with W. F. Snakard and is entitled to and is the owner of an undivided 7/8ths interest in and to all of the oil and gas leases covering the above described land and any party purchasing same does so at his own risk and peril and with notice of the rights of the undersigned adverse thereto."

Such document did not meet the requirements of the operating agreement as to a notice of intent to drill. As neither it nor the letter of April 8, 1955, was in conformity with the provisions of the operating agreement, it might well be found that Frankfort had never notified Snakard of an intent to develop the undrilled leases. In the absence of a notice of such intent no drilling obligation, beyond that for the first well, rested upon Frankfort. Nevertheless, the trial court found that Frankfort had elected to drill and it may be that such is a reasonable inference to be drawn from the circumstances. The question then is the effect of such election.

The operating agreement provided that when notice of intent to drill was given and the other party chose to participate, the operator "shall drill" and that when the election was not to participate, the party giving the notice "may

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[6] After the Burkett suit was filed Frankfort was made a party. This suit was disposed of by a judgment in favor of Snakard on June 30, 1955.

nevertheless drill." Snakard did not elect to participate. Hence, Frankfort, as the notifying party, had the right to drill but, as the operator, had no obligation to drill.

Snakard seeks to avoid this conclusion by asserting that the mentioned provisions relate to the division of expenses and not to the obligation to drill.[7] The position is not well taken as the provisions refer both to the obligation to drill and the responsibility for the expenses.

The last sentence of the paragraph, relating to notice of intent to drill and election to participate or not, reads thus:

> "Operations for the drilling of any well under the provisions of this paragraph must be commenced within ninety (90) days after the initial notice is given, and not thereafter."

[2, 3] Counsel for Snakard argue that the use of the word "must" obligates the notifying party to drill whether or not there is participation. The argument is not persuasive. All the provisions of the paragraph have to be considered together and given consistent effect if that is possible.[8] The provisions of the paragraph which preceded the quoted sentence provided that when there was a notice to drill and an election to participate, the operator shall drill. When a notice to drill was followed by an election not to participate the notifying party may nevertheless drill. The distinction is not eliminated by the quoted sentence. The effect of the 90-day provision is to require that if there is participation the well must be commenced within 90 days, and if there is an election not to participate the right to drill must be exercised within 90 days. Such

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[7] The contract language relating to the situation when there is an election to participate reads: "Operator shall drill such well for the Joint Account and at the joint cost of the parties, and such well shall for all purposes be a jointly-owned well." The language applicable when there is no election to participate is: "the party desiring to drill may nevertheless drill, complete and equip the well at its own cost and expense."

[8] Moyer v. Walker, 10 Cir., 276 F. 2d 681.

a construction gives effect to all the provisions of the contract. If a different construction were adopted, a party, by electing not to participate, could force the other party to drill at its own expense. This would be inconsistent with the provision which recognizes only a right, not an obligation, to drill when the election is not to participate. The Oklahoma rule is that " '[t]he intention of the parties must be deduced from the entire agreement, and every provision must be construed so as to be consistent with every other provision if possible, and that construction adopted which gives effect to every part of the contract.' "[9] The application of this rule to the case at bar requires the conclusion that, as a matter of law, the trial court erroneously concluded that Frankfort was obligated to drill each lease and breached its contract by failure to do so.

An additional argument advanced by counsel for Snakard should be mentioned. They contend that the effect of the actions of Frankfort, indicating an intent to drill, placed Snakard in an unfair position and, hence, Frankfort was required to drill. They insist that by refusing to participate Snakard became obligated to pay the drilling costs and could not take action to validate the leases by himself.

Assuming that the notices of intent to drill complied with the operating agreement as Snakard now contends, Snakard could have obligated Frankfort to drill by electing to participate. He did not do so. Instead, his lawyer replied to Frankfort's April 8 letter by saying that Frankfort had no right to demand an election but was obligated to drill all leases.[10] The position so taken was contrary to the

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[9] Postier v. Postier, Okl., 296 P. 2d 138, 139-140. Cf. Phillips Petroleum Co. v. McCormick, 10 Cir., 211 F. 2d 361, 364, and Occidental Life Ins. Co. of California v. Marmaduke Corbyn Agency, 10 Cir., 187 F. 2d 553, 555.

[10] The pertinent paragraphs of the letter are these:

"After careful consideration of all agreements between you and Mr. Snakard I am advising him that you have no right to demand any election from [him] but that you are required as the operator to drill and equip all the wells in question and to pay the expenses therefor and to receive reimbursement from

November 11, 1954, contracts. It is not now relied on by Snakard.

By the contracts, if Snakard chose not to participate, and Frankfort drilled, Frankfort could reimburse itself, out of production from the well, in an amount equal to double that which Snakard's share of the drilling costs would have been had he elected to participate. If the hole was dry, the entire cost would be borne by Frankfort. Having made such agreements, the parties were bound thereby. There is no claim that the written instruments did not fairly and accurately express the agreements of the parties. We need not consider here what might have been the situation if Snakard had started to drill before the terminal date and Frankfort had objected. Indeed, on two of the leases he did commence drilling operations. Although Snakard may have had faulty legal advice, that fact does not impose on Frankfort a drilling obligation which did not exist under the contracts.

[4] The second claim of contract violation is based upon the alleged failure of Frankfort to disclose to Snakard geological and geophysical information pertaining to the oil structures on the leased acreage. The operating agreement provides that the non-operator (Snakard) has the right of access to the leased premises, of inspection of the log, samples and cuttings from wells drilled, and of inspection and audit of the operator's books. Snakard was denied none of these rights. Frankfort had seismographic surveys and other geophysical work done on the properties. There is nothing in the operating agreement which requires Frankfort to furnish reports on such work to Snakard. Unless the failure to divulge such information

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the three-eighths of the seven-eighths working interest of W. F. Snakard as outlined in your letter of October 12, 1954.

"I am advising Mr. Snakard further that your obligation to drill under the contracts extends to all of the leases, that you do not have the right to refuse to drill upon any of such leases, and that you must drill on each property within the time specified in the leases."

is tied in with the breach of a fiduciary duty, it is not in violation of the contract.[11]

The third claim of breach of contract relates to the contention that the contract created a joint adventure which in turn created a fiduciary relationship which was breached by Frankfort. The argument in support thereof is beclouded by claims of fraud and slander of title.

[5] Fraud is asserted to exist because of misrepresentations by Frankfort that the potential oil field lay to the north and east of the Erwin No. 1 well, whereas information in possession of Frankfort disclosed, and drilling ultimately developed that the potential field was to the south and east. The brief for Snakard argues that these misrepresentations were made for the purpose of forcing Snakard into a farm-out agreement with Inland Oil Company. The difficulty is that the representations were never believed nor acted upon by Snakard. He consistently maintained that the field lay to the south and east. He refused to enter into the farm-out. Be that as it may, Rule 9(b), F.R.Civ.P., requires that the circumstances constituting fraud must be alleged with particularity.[12] Here, none of the circumstances relied on in the brief to establish fraud are covered by allegations in the pleadings.[13] Moreover, there are no findings by the trial court which would sustain a judgment based upon fraud. The circumstances presented to establish fraud merit consideration only inso-

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[11] Counsel for Snakard make much of the contention that the geological and geophysical surveys were charged in part against Snakard's account. This does not change the situation. There is no claim that Snakard ever paid such charges and, indeed, the charges would be improper. The point urged goes only to the accounting between the parties, not to the right of Snakard to the information.

[12] See C. Robert Ingram, Inc. v. Chrysler Corporation, 10 Cir., 256 F. 2d 684, 687; Cf. Nolan Bros. Inc., v. United States, 10 Cir., 266 F. 2d 143, 145-146.

[13] So far as the record before us discloses there was no pre-trial order. This is the type of a case in which great benefits could have been obtainable from an effective pre-trial conference and a definitive pre-trial order.

far as they bear upon a breach of the fiduciary relationship asserted to exist by reason of the contracts.

Snakard contends that Frankfort slandered his title by filing the caveat for record. A lawyer for Frankfort testified that he filed the caveat to protect Frankfort's interests because Snakard had not executed all of the lease assignments to which Frankfort was entitled. The caveat referred to the 1954 contracts, described the leased land, and claimed a 7/8 interest in the leases for Frankfort. The agreements themselves could have been filed. The caveat is no more objectionable than the agreements, except for the claim of a 7/8 interest. By the contracts, as to all wells after the first, Frankfort, in wells in which Snakard elected not to participate, had a 7/8 interest until reimbursed up to 200% of Snakard's share of the drilling costs. Thus, in some instances, Frankfort's interest was 7/8 and in some 1/2.

[6-9] The Oklahoma rule is that the principal element in a suit for slander of title is malice.[14] By filing the caveat Frankfort was asserting an interest in the properties under its contracts with Snakard. It had a right to do this unless it was actuated by some wrongful motive which would establish malice.[15] The question of malice is for the trier of the facts.[16] The case at bar was tried to the court and the court made no finding of malice. No question is raised by Snakard in regard to the omission of such finding. It follows that the judgment cannot be sustained on the theory of slander of title.

[10, 11] By their November 11, 1954, contracts the parties entered into a common undertaking involving jointly-owned

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[14] Keiser v. Kile, 166 Okl. 41, 26 P. 2d 194, 195. Cf. R. Olsen Oil Co. v. Fidler, 10 Cir., 199 F. 2d 868, 872, and Berryman v. Sinclair Prairie Oil Co., 10 Cir., 164 F. 2d 734, 736.

[15] Ward v. Mid West & Gulf Co., 97 Okl. 252, 223 P. 170, 171. Cf. 4 Summers, Oil and Gas, § 660, p. 49 (1938).

[16] New England Oil & Pipe Line Co. v. Rogers, 154 Okl. 285, 7 P. 2d 638, 643.

property and a sharing of the profits. They were engaged in a joint adventure.[17] The relationship so created was fiduciary in character and required the utmost good faith on the part of both parties.[18] The extent and effect of such relationship is determined by the written agreements between the parties defining and delineating the powers and rights of each. In such a situation it is presumed that they delegated all the powers they wished to confer upon each other and withheld all powers or authority not affirmatively delegated.[19] The relationships between them are controlled by the terms of their agreements voluntarily made.[20]

[12] Frankfort is said to have breached its fiduciary duty by withholding geological and geophysical information. There was no contractual obligation on Frankfort to divulge that information. As noted above, the contracts did entitle Snakard to certain information and no claim is asserted that any such information was withheld from him. Snakard's argument in this regard is a plea that we add to the contract a provision requiring that Frankfort furnish all geographical and geophysical data. We are without power to rewrite the contract for the parties.

The filing of the caveat is asserted as a breach by Frankfort of its fiduciary duty. Frankfort had the right to give notice of its interest in the property. The document filed did not describe that interest with complete accuracy. At the time it was filed the leases were all in effect. The caveat had no bearing on the rights of the parties during

[17] Eagle Picher Co. v. Mid Continent Lead & Zinc Co., 10 Cir., 209 F. 2d 917, 919; Kasishke v. Baker, 10 Cir., 146 F. 2d 113, 115, certiorari denied 325 U.S. 856, 65 S. Ct. 1185, 89 L. Ed. 1976.

[18] Vilbig Const. Co. v. Whitham, 194 Okl. 460, 152 P. 2d 916, 919; Kaye v. Smitherman, 10 Cir., 225 F. 2d 583, 594, certiorari denied 350 U.S. 913, 76 S. Ct. 197; 100 L. Ed. 800.

[19] Taylor v. Brindley, 10 Cir., 164 F. 2d 235, 241.

[20] Holmes v. Keets, 80 U.S. App. D.C. 327, 153 F. 2d 132, 133. Cf. Champlin v. Commissioner of Internal Revenue, 10 Cir., 71 F. 2d 23, 27, footnote 3.

the effective period of the November 11, 1954, agreements and of the leases covered thereby. Those rights were controlled by the contracts. As to leases which Frankfort did not validate by drilling, the failure to withdraw the caveat after July 1, 1955, might have resulted in a slander of title but not in a breach of a contractual fiduciary obligation. As we have shown, the claim of slander of title fails because the essential ingredient of malice is lacking.

[13] A further charge of misconduct in violation of the asserted fiducial duty is that Frankfort misrepresented the facts as to the preferred development of the leased area by informing Snakard that the greatest potential was to the north and east of the Erwin No. 1 well when in fact the data available to Frankfort disclosed that the field lay to the south and east of that well. These misrepresentations were allegedly made to induce Snakard to enter into a farm-out agreement with Inland Oil Company. The claim of falsity is based on the assertion that the geological and geophysical information in possession of Frankfort showed the field to lie to the south. The interpretation of such data involves opinion and judgment. Otherwise the element of uncertainty so characteristic of the oil business would be greatly reduced in importance. The officials for Frankfort attempted to justify their opinion that the field lay to the north. Snakard was equally insistent that the field lay to the south. The substantiation of Snakard's opinion by later drilling shows that his judgment was the better. The opinions and conclusions of Frankfort did not breach any contractual fiducial duty unless they resulted in some overreaching of Snakard. The record disclosed no such overreaching.

After the completion of the Erwin No. 1 well, the president of Inland offered Snakard $100,000 for his interest in the leases. Snakard refused to sell. Frankfort then proposed the farm-out to Inland. The trial court made no findings as to the details of this proposal and the testimony with relation thereto lacks clarity. There is attached

to answers made by Snakard to interrogatories propounded to him an unexecuted agreement wherein Inland would drill two wells without expense to Frankfort and Snakard.[21] Upon the completion of these wells to the designated horizon, Frankfort and Snakard would jointly assign an undivided half interest in a total of 120 acres covered by the Christian and Thomas leases.[22] Whatever the advantages or disadvantages of such an arrangement to Snakard may have been, the matter is of little importance now as Snakard rejected the farm-out. The leases were lost by failure to drill. The obligation to drill depended upon the provisions of the contracts. Such obligation was neither enhanced nor diminished by opinions concerning the area with the greatest potential for development.

Snakard further charges that the conduct of Frankfort was designed to eliminate the interest of Snakard so that Frankfort could toplease.[23] This is answered by the trial court's finding, not now attacked, that: "Defendant [Frankfort] did not later [after July 1, 1955] acquire any interest in the expired Mansfield, Christian, Thomas, Simpson or Lee leases."

Financially, the loss of the Christian, Thomas and Simpson leases was just as great a blow to Frankfort as it was to Snakard. The drilling of the wells to the north and east of the Erwin No. 1 well, when viewed in retrospect, was the exercise of very bad judgment. Frankfort expended its own money in such operations

[21] One on the 160-acre Christian lease and one on the 160-acre Thomas lease.

[22] Of this, 40 acres were in the Christian lease and 80 acres in the Thomas lease. As the area was drilled by others up to July, 1958, there were three producing wells on the Christian lease and six on the Thomas lease. Maps introduced in evidence indicate that two of these wells are possibly on acreage in which a ½ interest would have been assigned to Inland.

[23] In the oil and gas vernacular to toplease is to secure a lease on land covered by an existing lease to the end that the toplease will be effective after the expiration of the existing lease and the interest of one or more lessees thereby eliminated. Topleasing has the same invidious characteristics as claim jumping.

and it thereby validated the Magnolia, Nitner, Clark and Amerada leases. Those operations were in conformity with the November 11, 1954, contracts. If Snakard had been confident in his judgment as to the south leases, he had the right to give notice of intent to drill, and, unless Frankfort had elected to participate and then drilled the wells as the operator, Frankfort would have had no interest in wells so drilled or in the acreage allocable thereto. As it turned out, the leases were not validated and each party lost.[24]

This is not a case of the unjust enrichment of one joint adventurer at the expense of another joint adventurer. Such cases as Blackstock Oil Company v. Caston, 184 Okl. 489, 87 P.2d 1087, and Campbell v. Gooch, 131 Kan. 456, 292 P. 752, do not apply. Those cases considered situations where one joint adventurer, by fraud, inveigled the other joint adventurer to sell at less than actual value. The record now before us shows that bad judgment, bad advice, obstinacy, and misunderstanding joined to produce the loss by both Frankfort and Snakard of leases covering land from which substantial oil production was later secured by others. We can neither rewrite the contracts for the parties nor protect Snakard from the results of the contracts which he made.[25]

Reversed with directions to enter judgment in favor of defendant Frankfort.

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[24] We are aware that Snakard began drilling on the Thomas in an effort to validate. However, litigation involving the continuity of his operations resulted in a settlement whereby his interest was eliminated.

[25] C. Robert Ingram, Inc. v. Chrysler Corporation, supra.

**APPENDIX C1**

Mr. W. F. Snakard, Wellston, Oklahoma.

Re: All of Section 35 and Sw 4 of Section 36, T15N, R2E, and W 2 of Section 2 and NE 4 of Section 3, T14N, R2E, all in Lincoln County, Oklahoma.

Dear Sir: This letter will set forth the agreement of Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc. with you concerning the acquisition from you of an undivided ½ interest in oil and gas leases covering all mineral interests in the above described land.

It is understood that you have all of the oil and gas leases covering the above described land in your possession except from Amerada Petroleum Corporation, and that you and we have four joint letters addressed to both of us from Amerada agreeing to execute oil and gas leases to us on its interests in the above described acreage.

You agree forthwith to assign to us an undivided half interest in all leases now in your possession covering the above described land and we agree to pay you $1.00 per net acre for such leases.

Notwithstanding the fact that the Amerada letters are addressed to us jointly and therefore place certain joint obligations upon us, it is understood that as between us you are to be solely responsible for complying with the terms of the Amerada letters, copies of which are attached hereto. You agree to indemnify and hold us harmless from and against any and all claims, suits, demands or judgments (including court costs and reasonable attorneys fees) which might arise out of any failure on your part to comply with the terms of the said Amerada letters. It is understood that upon compliance with said Amerada letters, both of us will obtain the oil and gas leases covered by said letters, and thereafter we shall promptly pay you $1.00 per net acre for our interests in such Amerada oil and gas leases.

You agree to endeavor to obtain all existing abstracts covering the above described acreage and you further agree to order supplemental abstracts on all of said acreage bringing them down to date. The expense of said supplemental abstracts shall be shared equally between us. Upon obtaining said supplemental abstracts you agree to furnish all abstracts to Frankfort's attorneys for examination of title. The fees of Frankfort's attorneys for title examinations shall be shared equally between us. We shall have the right to call upon you to satisfy any of the requirements made by our attorneys and you agree to exercise your best efforts to satisfy same and to take full and complete responsibility for doing so and without our having to take any action in this connection. We agree to pay ½ of all traveling expenses, attorneys fees, court costs and other expenses incurred in connection with obtaining the curative matter which we request you to obtain; provided, however, that our maximum obligation shall be $5,000.00 and you are to bear all costs in excess of such maximum.

It is agreed that we shall have the first refusal to purchase all or any portion of your interest in any of the leases covered hereby in the event a bona fide offer of purchase is made to you by some other party and you wish to sell same. If you wish to sell, you shall communicate any bonda fide offer made by others to you and we shall have 48 hours within which to purchase on the same terms and conditions and at the same price as the offer made by the other party.

It is understood that all leases provide only for the usual ⅛ landowners royalty and are not burdened by any overrides, oil payments or other carried interests, and this agreement is being made upon the basis of your representation to us that such is the fact.

If the above and foregoing correctly sets forth our agreement, please so indicate in the space provided below and

return three copies to us, whereupon this letter shall become the contract between us.

Very truly yours,

Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc.,
By Leyton C. Frank

Accepted And Agreed To This 11 Day Of Nov., 1954.
W. F. Snakard.

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**APPENDIX C2**

DRILLING CONTRACT

This Agreement made this 12th day of October A.D., 1954 by and between W. F. Snakard hereinafter designated as the Contractor and Frankfort Oil Company, a corporation with petroleum division offices at Bartlesville, Oklahoma, hereinafter designated as Company. Witnesseth:

That, for and in consideration of the mutual promises and agreements hereof, the parties enter into the following agreement, to-wit:

First: The Contractor agrees to begin on or before Dec. 6, 1954 the actual drilling of a well for the production of crude petroleum and natural gas at the location designated as the Company's Well No. 1 in the Center SW SE of Sec. 35 Twp. 15N. R. 2E on the Stanolind Farm; situated in Lincoln County in the State of Oklahoma and to diligently prosecute in a workmanlike manner the drilling thereof to adequately test the Arbuckle expected at an approximate depth of 5700 feet unless expressly accepted or abandoned at a lesser depth by direction of the Company: The Contractor thereupon as full compensation shall be entitled to receive pay for the actual number of feet drilled at the drilling rate as hereinafter provided; no payment, however, to be due in case of abandonment due to failure or

fault of Contractor or his employees, and in such latter case Contractor shall not be entitled to pay for drilling or shut down time on the abandoned hole, and shall bear the full cost of moving said rig to new location, as well as cost of casing or other Company property lost or destroyed at abandoned hole.

It is understood that Contractor does not by reason of this contract become an employee of the Company but is an independent contractor not subject to the direction and control of the Company except as to the results to be accomplished.

Contractor shall furnish at his sole risk and expense all labor, tools, machinery, services and supplies of whatsoever character necessary or proper to complete said well. Only such exceptions and additional costs as are hereinafter specifically provided will be furnished by the Company.

Contractor agrees to set and cement surface pipe and to continue drilling to the expected producing horizon above mentioned unless otherwise specified by Company. Contractor agrees to properly run, set and cement a string of casing at the expected producing horizon or at any other depth above such horizon as may be specified by Company's representative, then shut down for a reasonable length of time as is necessary to permit cement to set, drill plugs, prove casing is tight and outside waters are shut off, then continue testing or drilling as specified by Company. If Company specifies a permanent string of casing to be set in a horizon above contract depth and Company desires to complete well at approximate contract depth then such casing furnished by Company shall be of sufficient size to allow completion of the well to contract depth. In such case the only cost to Company for setting said additional casing shall be for cementing and such day work as may be specified for the testing of such horizon and shall be at the rate provided in Paragraph 2 hereof for day work.

Contractor agrees to replace any equipment furnished by the Company in the event it should be destroyed or damaged through his negligence or that of his employees, or that of any person, other than the agents of the Company suffered by him to visit said well; to return to the Company upon the completion of said well or the abandonment thereof, the equipment furnished by it in as good condition as when received by him, ordinary wear and tear and the action of the elements alone excepted.

During the course of drilling with rotary tools Contractor shall not pull drill pipe from well when drilling through any strata in which a heavy flow of gas is expected until the hole has been filled to the top with a heavy mud-laden fluid; shall keep good mud separate from sand and lime; shall maintain rotary mud in condition at all times so that satisfactory cuttings of the formation drilled will be returned to the surface. Contractor shall notify Company when well approaches a probable producing horizon and shall not drill into or through an oil or gas bearing formation unless so authorized by the Company.

Contractor agrees to furnish daily drilling reports to the Company on forms furnished by it and to keep secret all information pertaining to said well from all persons, other than authorized representatives of the Company and prohibit all persons other than his employees and the authorized agents of the Company from entering said rig or remaining in close proximity thereto.

Contractor agrees to do such coring as may be required when specified by the Company and to assist with his crew and equipment in running drill stem tests, electric surveys or other approved methods of special testing as may be furnished and designated by the Company. In the event said well is non-productive of oil or gas in paying quantities when prospective producing zone at approximate contract depth is reached Contractor shall furnish equipment and crew to assist in salvaging pipe from hole and in plugging and abandoning well.

Contractor shall inspect and examine such machinery, casing or other equipment as may be furnished by the Company and if any defects be found therein sufficient to make said equipment unsafe, to immediately notify the Company thereof and to assume all responsibility for any damage or loss arising from such defects except such as may have been reported and such as may be impossible to discover by a reasonable inspection.

Contractor shall remove at his own expense the fires, boilers or other hazards to a safe distance from the well when oil or gas in sufficient quantities to endanger the rig equipment or materials is found therein.

Contractor shall comply with workmen's compensation and employer's liability laws of the state in which work is to be performed and hold Company harmless from any and all liability for damage to the person and/or property of any and all persons resulting from the operations of Contractor. At his sole expense and before drilling operations are commenced Contractor shall submit valid policies for Company approval and certificates of insurance thereof with minimum limits as follows: workmen's compensation and employer's liability $25/50,000 and $25,000 per person where stipulation of state requires death limit; M. C. public liability for bodily injury $25,/50,000 and property damage $25,000; for such trucks and automotive equipment as Contractor may use in performing work herein specified, public liability of $25,/50,000 and property damage of $10,000 shall be provided. Contractor agrees to pay all State and Federal Social Security taxes or contributions imposed by any governmental authority with respect to the employment of others, and to reimburse the Company for any such taxes or contributions for which the Company may be secondarily liable through his failure to discharge his primary liability. The "Fair Labor Standards Act of 1938" and regulations of the Wage and Hour Division of the Department of Labor shall be complied with by Contractor insofar as said Act may be applicable.

Contractor agrees to comply with all laws and regulations of any legal authority having jurisdiction of the matters involved in this contract.

Contractor further agrees as far as practical to drill a vertical hole, and in no case shall the hole when completed have a deviation of more than five (5) degrees from vertical. Company shall have the right (but is not required) to take slope tests every five hundred (500) feet, failure to take such tests, however, in no way relieving Contractor of obligations hereunder. If any such tests show the hole to deviate more than five (5) degrees from vertical or perpendicular, Contractor shall redrill the hole if desired by Company.

In case the Contractor shall neglect to supply enough properly skilled workmen or suitable drilling tools, machinery and appliances, or shall neglect or discontinue the work of drilling the well for the space of five days, without the consent of the Company, such neglect or discontinuance of itself shall work a forfeiture of all rights and claims of the Contractor under this agreement, and without notice or demand by the Company. The Company at any time after such forfeiture shall have the right to take possession of the well, discontinue the drilling thereof and at its pleasure dismantle or abandon the same without liability to the Contractor for any portion of the contract price above mentioned. The Company, if it so elects, also shall have the right after such forfeiture to take possession of the well and the drilling tools, machinery and appliances of the Contractor and drill the well to completion. In case the Company shall succeed in completing the well, the cost of operations, without any allowance to the Contractor for the use of such drilling tools, machinery and appliances, shall be deducted from the contract price, and the balance, if any, paid to the Contractor. However, if the Company should not succeed in completing the well, it shall not be liable to the Contractor in any sum whatever, except to return such drilling tools, machinery and appliances to the

Contractor in as good condition as when received, natural wear and tear excepted.

Delay in performance hereunder shall be excused if caused by fire, flood, civil disturbance, act of God, war, insurrection or any other cause similar or dissimilar, if same is beyond the power of performing party to prevent or correct, but performance shall continue as soon as said cause is removed.

Contractor agrees not to assign this contract without the written consent of the Company.

1. Furnish rig and auxiliary equipment.

2. Drill 9" hole to total depth.

3. Furnish bits, water, fuel and $500.00 mud.

Second: The Company agrees to pay Contractor upon full performance of this agreement and the completion and delivery of the well to it free from liens or valid claims for liens Eight and 66/100 Dollars ($8.66) per foot, Company shall pay the rate of Thirty-five and no/100 ($35.00) dollars per hour for any day work requested by Company with drill pipe and rotary tools, and Twenty and no/100 ($20.00) dollars per hour for such day work without drill pipe.

Company shall not be liable to pay for any time waiting for cement to set, unless otherwise specified herein.

Company shall pay day rate while circulating, coring, or waiting on orders when drilling in prospective pay horizon, unless otherwise provided; pay for labor only while work on the drilling of well is shut down waiting on it to furnish casing or other materials herein provided, but it shall not be liable to Contractor for any damages he may sustain on account of such reasonable delay.

Company agrees to furnish:

1. Location, road and pits.

2. Mud in excess of $500.00.

3. Surface casing and oil string.

4. Pay for cement and cementing of surface and oil string.

5. Special services (electric logging, sidewall and conventional coring, drill stem tests, etc.

Anything in this contract to the contrary notwithstanding it is agreed between the parties that in the event the drilling of this well is halted or shut down before completion because of any order, rule or regulation of any governmental agency, either State or Federal, for any reason whatsoever, the Contractor will be entitled to and will make charge to the Company only for reimbursement of the actual expense of labor and material and direct cost incurred in drilling operations up to and not beyond the time Company notifies Contractor such shut down order is effective and payment on that basis shall relieve Company of any further liability under this contract.

In Witness Whereof the Contractor has hereunto subscribed or caused his name to be subscribed, and the Company has hereunto caused its name to be subscribed, the day and year above written.

By W. F. Snakard-11-11-54

Frankfort Oil Company

By [Illegible]

**APPENDIX C3**

October 12, 1954

Mr. W. F. Snakard, Wellston, Oklahoma.

Re: All of Section 35 and SW/4 of Section 36, T15N, R2E; and W/2 of Section 2 and NE/4 of Section 3, T14N, R2E, all in Lincoln County, Oklahoma.

Dear Sir: We are the owners of an undivided ½ interest in the oil and gas leases covering the above described

land. We have entered into an agreement with you to deepen an old hole in the NW SW SE of Section 35-15N-2E, and a portion of that agreement is covered by the attached drilling contract. This letter will set forth the balance of the terms of our agreement.

Notwithstanding the fact that we only own an undivided half interest in the above land, including the land upon which the drilling is to be performed, we agree to pay the entire cost of drilling as set forth in said drilling contract; provided, however, that we shall be entitled to reimburse ourselves for 200 per cent of ½ of the cost of said drilling as set forth in more detail below.

Before going into such detail, however, we wish to cover certain other matters as follows.

Notwithstanding any provision in said drilling contract attached hereto to the contrary, it is expressly understood that there is an old hole in the above described land and that you agree to conduct all operations on the basis of going into said old hole and deepening it, including whipstocking if necessary.

It is further understood that you are obligated to deepen the old hole to a depth sufficient to adequately test the Arbuckle expected at an approximate depth of 5700 feet. If you do not reach said depth, then, regardless of whether it is your fault or not and even if it is due to causes beyond your control, you shall be entitled to no payment under said drilling contract.

It is understood that you will drill the hole and place it in such condition that 7 inch casing can be run to total depth.. We shall have the sole decision as to whether or not casing is run and if we decide to run casing, you agree to do so at the day work price set forth in said drilling contract attached hereto.

It is further understood that your right to receive any compensation whatsoever under said drilling contract is

urther conditioned upon your satisfying the title require-
ents of Frankfort's attorneys upon all of the oil and gas
eases covering all of the land described in the caption of
is letter.

In other words, upon completion of the drilling require-
ents set forth in said drilling contract and in this letter
nd upon your furnishing us with titles to the oil and gas
eases covering the land described in the caption of this
tter satisfactory to our attorneys, you shall then be en-
tled to prompt payment of the price set forth in said
rilling contract attached hereto.

If the test well covered by this letter is productive of
il or gas, Frankfort shall become the operator of all the
roperties covered by this agreement. Frankfort shall so
perate on the basis of the printed form of operating agree-
ent attached hereto and made a part hereof, except as
llows. That portion of said printed operating agreement
roviding that a "non-participating party" in any well
all lose their interest in such well and in the lease upon
hich the well is located is hereby changed to provide as
llows. If any well is productive in which you are a "non-
articipating party", Frankfort Oil Company shall own all
ipe and equipment in or on said well and $\frac{7}{8}$s of all working
terest production from such well, and you shall own $\frac{1}{8}$ of
l working interest production from such well; provided
owever, that at such time as Frankfort Oil Company, its
uccessors or assigns, shall have received, out of the net
roceeds from the sale of $\frac{3}{8}$s of the working interest pro-
uction from said well which otherwise would have be-
nged separately to you (after deducting that portion
tributable to such interest of the royalties and the ex-
enses incurred in operating the well up to such time and
verance, production and like taxes paid or payable on said
of the working interest production) a sum of money
ual to 200 per cent of the $\frac{1}{2}$ of the cost and expenses
hich would have been borne by you had such well been
rilled, completed and equipped at the cost and expense of

both of us jointly, Frankfort Oil Company shall thereupon transfer and assign to you an additional 3/8 of the working interest in said well and the casing and equipment therein and thereon and the subsequent production therefrom, so that you will then have a total of 1/2 of the working interest.

It is understood that we shall be entitled to bill you currently for 1/8 of the operating expenses of the producing properties and that you shall pay same personally as they are billed, and this provision shall apply at all times immediately after any production is obtained and shall not be delayed during the reimbursement period provided above.

It is understood that a number of the oil and gas leases covering the acreage described in the caption of this letter contain drilling clauses and that Frankfort shall be entitled to comply with any of the drilling clauses which it chooses to comply with and if you do not wish to be a participating party in the costs of drilling any of such wells, the provisions of this letter shall apply thereto just as to any other wells to be drilled on the properties covered hereby.

If the above and foregoing correctly sets forth our understanding, please so indicate in the space provided below and thereupon this letter shall become the contract between us.

Very truly yours,

Frankfort Oil Company, a division of Carstairs Bros. Distilling Co., Inc.

By Leyton C. Frank

Accepted And Agreed To This 11 Day of Nov., 1954.
W. F. Snakard.

**APPENDIX C4**

## Joint Operating Contract
## (Oil, Gas And Other Minerals)

This Agreement, made and entered into by and between W. F. Snakard of Wellston, Oklahoma (hereinafter called "Non-Operators" whether one or more) and Frankfort Oil Company, a division of Carstairs Bros. Distilling Company, Inc. (hereinafter called "Operator"), Witnesseth That:

Whereas, Operator and Non-Operators respectively are the owners of the oil and gas leases covering the lands described in "Exhibit A" hereto attached and made a part hereof, hereinafter for convenience referred to as "Joint Leases," and it is the desire of the parties hereto that Operator shall be in charge of exploration, development and other operations under said Joint Leases in accordance with the agreements and provisions hereinafter contained:

Now, Therefore, in consideration of the premises and the mutual covenants and agreements herein contained, the parties hereto agree as follows:

1. General Duties Of Operator. Operator shall have, subject to the terms, provisions and limitations hereinafter expressed, exclusive charge, control and supervision of all operations of every kind to be conducted on the Joint Leases for the exploration for and development, production, treating and handling of oil, gas and other minerals therefrom, as well as the payment of all taxes and other charges (except delay rentals) which may arise or become due or payable in connection with such operations.

Operator shall, on behalf of the parties, initially pay and discharge all costs and expenses incurred in the development and operation of the Joint Leases hereunder; provided, however, that Non-Operators shall, if requested by Operator, advance their proportionate part of the anticipated development and operating costs and expenses in

accordance with an estimate to be made by Operator not less than ten (10) days in advance of the month in which the costs and expenses are to be incurred. Adjustments between estimates and actual costs shall be made by Operator at the close of each calendar month, and the account of each Non-Operator shall be adjusted accordingly.

Operator shall secure and furnish all material, labor and services necessary for operations hereunder; provided, however, that the number of employees, the selection of such employees, the hours of labor, and the compensation for services to be paid any and all such employees, shall be determined by Operator, such employees shall be employees of Operator.

At such times as tubular goods and other equipment are needed for operations hereunder and Operator is compelled to furnish, from its warehouse or other properties, materal acquired or purchased at values or prices in excess of those determined in accordance with the provisions of this agreement, or the accounting procedure attached hereto, Operator will attach to a Job Order Request a notification to that effect and forward same to Non-Operators for approval; then, unless Non-Operators advise of their election to supply in kind at the location, or at the railway receiving point nearest thereto, their proportionate share of any such material of like grade and quality, and forth with deliver the same, Operator will furnish all such material, to the Joint Account and will charge Non-Operators, or such ones of them as do not make such election, for their proportionate share thereof on the basis of Operator's direct costs and expenses (not including any overhead charges) incurred in acquiring or purchasing and shipping such material so transferred and in moving it to the Joint Leases.

Operator shall keep an accurate record of the Joint Account hereunder showing the costs and expenses incurred and charges made and all credits and returns made and received, which record shall be available at all reasonable

times for the consideration, examination and inspection of each of Non-Operators and its duly authorized representatives.

2. Ownership Of Production And Charges To Joint Account. Subject to the terms of paragraph 4 hereof, all production from the Joint Leases shall be owned by the parties hereto in the proportion that the interest of each of the parties in the Joint Leases bears to the total of the interests in the Joint Leases of the parties hereto, the interest of each party being as follows:

W. F. Snakard—⅛ working interest.

Frankfort Oil Co.—⅞ working interest until Frankfort receives the monies provided in Letter Agreement dated October 12, 1954 *than* Snakard to be owner of 4 8 working interest and Frankfort owner of 4 8 working interest.

All charges made to the Joint Account as provided herein shall be borne and all credits and returns shall be shared by the parties hereto in the same proportion in which the parties own the production from the Joint Leases.

Operator shall charge the Joint Account with all costs and expenses incurred in connection with the operation of the Joint Leases as herein contemplated. Such charges shall be in accordance with "Exhibit B" hereto attached and made a part hereof for all purposes. Operator shall bill 'Non-Operators for Non-Operators' share of such charges, and payments therefor shall be made by Non-Operators under the Joint Account in accordance with said "Exhibit B."

3. Liens. Each Non-Operator grants to Operator a lien on its interest in the Joint Leases, the production therefrom, and any and all fixtures, improvements and personal property now or hereafter located thereon to secure the payment of its proportionate part of all investments, made by Operator for, and costs and expenses incurred by Operator against, the Joint Account hereunder, which lien

may be enforced as any other mortgage lien. Should any Non-Operator fail to pay its proportionate part of all statements rendered as provided in "Exhibit B" within fifteen (15) days therein stipulated, Operator shall have the right at its option at any time thereafter, such default continuing, to foreclose said lien upon the interests of Non-Operator in default.

4. Drilling And Development Of Joint Leases. All wells drilled on the Joint Leases for the account of the parties hereto, shall be drilled under contract based on the usual rates prevailing in the field in which the Joint Leases are located or upon competitive bidding, as the parties may direct. Operator, if it so desires, may employ its own tools and equipment in the drilling of wells; but same shall be drilled either at the prevailing rate in the field or upon competitive bidding, as the parties may direct. All drilling, whether by Operator or others, shall be under contracts approved by the parties hereto, which contract shall contain appropriate provisions that any well drilled on the Joint Leases when completed shall not deviate in excess of 5 degrees from perpendicular.

No wells shall be drilled at the cost and expense of the Joint Account unless mutually agreed upon by the parties hereto as to the depth and location of each such well. Operator shall secure the written approval of each of the Non-Operators before incurring against the Joint Account any item of expenditure, which item itself is in excess of Two Thousand Dollars ($2,000.00), except in the drilling, equipping and completing of any well as to which well or wells the parties mutually agree, and except in the case of expenses reasonably incurred in safeguarding life and property in case of a blowout, explosion, fire, flood, storm, hurricane, or catastrophe or other sudden emergency. Operator shall submit to Non-Operators an Authority for Expenditure form in triplicate for *approval* by Non-Operators in connection with any construction, development or operational expenditure in excess of the maximum amount

permitted Operator hereunder without prior approval of Non-Operators. The Authority for Expenditure form as submitted shall include sufficient detail concerning the estimated cost to enable Non-Operators to make a reasonable analysis on which to base approval.

Should any party hereto desire to drill a well on the Joint Leases, the party so desiring to drill shall give written notice of its desire to commence operations for the drilling of the well to each of the other parties and in such notice shall state the depth to which it desires to drill such well, the location thereof, and whether it intends to contract with an independent contractor for the drilling of such well or to drill the well itself. Each party so notified shall within ten (10) days after receipt of such notice advise in writing the party giving notice whether or not the party receiving notice is willing to join in the drilling of said well. If within such ten-day period all parties receiving such notice agree that the well should be drilled and so notify the party originally desiring to drill the well, then Operator shall drill such well for the Joint Account and at the joint cost of the parties, and such well shall for all purposes be a jointly-owned well. If within such ten-day period any party or parties hereto shall notify the party desiring to drill that it or they do not desire to participate in the cost and expense of drilling, equipping and completing the well, they shall be "Non-participating Parties," as to such wells. All other parties shall be participating parties as to such well. The cost and expense of such well shall be borne by the Participating Parties, each bearing that portion thereof which its interest in the Joint Leases bears to the total interest therein of all Participating Parties. The Non-Participating Parties shall not be responsible for any part of such cost and expense. If all other parties give such notice and become Non-Participating Parties, the party desiring to drill may nevertheless drill, complete and equip the well at its own cost and expense. If Operator is a Participating Party in such well, it shall be in charge of

drilling same under the terms hereof at the expense of the Participating Parties. Operations for the drilling of any well under the provisions of this paragraph must be commenced within ninety (90) days after the initial notice is given, and not thereafter.

Any well drilled on the Joint Leases by any party hereto as permitted in the provisions of the preceding paragraph and which is not drilled at the cost and expense of the Joint Account, and all pipe and equipment in or on said well and all production from such well, and all remaining acreage on the lease on which such well is located except acreage allocated to any producing well thereon, shall be owned entirely by the Participating Parties drilling the same whether it is completed as a producer or as a dry hole. If the well is a dry hole, all salvable equipment therein and thereon shall be owned by the Participating Parties, and they shall plug and abandon the well at their sole cost and expense.

Operations to dually complete any well or to recomplete any well in a different horizon from that in which such well is producing shall be treated as operations for the drilling of a new well under this Paragraph 4.

5. Taking Products In Kind: Marketing Of Products. Each Non-Operator shall have the right and privilege of receiving in kind and separately disposing of its portion of the oil, gas and other minerals produced and saved from the Joint Leases. Such production shall be delivered to the Non-Operator involved into the pipe line or lines to which the well or wells on the Joint Leases may be connected or into storage tanks on the Joint Leases, if any are provided at the expense of the parties, or into tanks furnished by the Non-Operator. Each Non-Operator shall bear any extra expense incurred by Operator in delivering in kind Non-Operator's portion of the production from the Joint Leases.

Should any Non-Operator hereunder be in arrears in its payments to Operator, as herein provided, Operator shall

have the right, upon demand, to receive from the purchaser of the production such Non-Operator's portion of the proceeds and apply the proceeds on amounts in arrears.

6. Insurance—Compliance With Laws And Regulations.

(a) As to all operations hereunder, Operator shall carry for the benefit and protection of the parties hereto Workmen's compensation insurance meeting the requirements of law, and such other insurance as Operator may in its sole judgement deem necessary.

(b) All damage or injury to the joint property shall be borne by the parties hereto in proportion to their interests therein. The liability, if any, of the parties hereto in damages for claims growing out of personal injury to or death of third parties or injury to or destruction of property of third parties resulting from the operations conducted hereunder shall be borne in proportion to their interests in the joint property.

7. Non-Operators' Rights And Privileges. Each Non-Operator shall have the following specific rights and privileges:

(a) Access to the Joint Leases at all reasonable times to inspect the operations hereunder.

(b) The right to inspect the logs, samples, and cuttings from any and all wells drilled hereunder and to receive copies of the logs.

(c) The right to inspect and audit at all reasonable times the Operator's books, records and invoices pertaining to any matter of accounting arising hereunder.

8. Liability Of Parties. The liability of the parties hereunder shall be several and not joint or collective. Each party shall be responsible only for its obligations as set out herein and shall be liable only for its proportionate share of the cost of operation hereunder. Nothing herein shall

be construed as an assignment or transfer of the leases or an interest therein as between the parties hereto.

9. Right Of Parties To Withdraw Or Assign. The leases covered by this agreement shall not be surrendered in whole or in part unless the parties mutually consent thereto. Should any party at any time desire to surrender the leases subject hereto and the other party or parties should not agree or consent to such surrender, the party desiring so to surrender shall assign, without express or implied warranty of title, all of its interest in such leases to the party or parties not desiring to surrender. In such assignment the assigning party shall cover only its interest in the leases subject hereto and shall sever therefrom its interest in all pipe, casing, valves, tanks, warehouses and buildings and any and all other property and equipment (whether similar or dissimilar to such specific enumeration) located and installed in or on the Joint Leases or the well or wells thereon as to which there exists the right of removal as a contractual right in and under the Joint Leases and which therefore are personal property as distinguished from fixtures to the realty, and the interest of such party in said property and equipment shall be assigned and transferred by it in a separate assignment or bill of sale to the party or parties not desiring to surrender. No consideration shall be paid for the assignment of the interest in the leases other than the release of the assigning party from thereafter accruing obligations hereunder, but as consideration for the bill of sale the assigning party shall be entitled to be paid for its interest in such personal property and equipment so assigned at the salvage value thereof, determined as provided in "Exhibit B." From and after the making of such assignment and bill of sale, the assigning party shall have no further interest in the leases assigned, and such assigning party shall be relieved from all obligations thereafter (but not theretofore) accruing hereunder.

Each party hereto owning an undivided interest in the Joint Leases waives any and all rights it might have to

partition the Joint Leases and have set aside to it in severalty its undivided interest therein. Before the sale by any party hereto of its interest in the Joint Leases, or any of them, the other parties hereto shall be given the refusal thereof at the price offered in good faith by a third party and shall have the preferred right to purchase at the price stated, which right shall be exercised within ten (10) days after receipt of written notice of the offer made by a third party. Should more than one party hereto exercise the preferred right to purchase, the interest in the Joint Leases shall be assigned to them in proportion to their several interests then held in the Joint Leases. This provision shall not apply in the event of a sale to a subsidiary, affiliated or successor company of any party hereto, or to the sale by a party hereto of its interest in the Joint Leases as a part of the sale of all its assets.

10. Responsibility Of Operator. In the conduct of operations hereunder, Operator shall be obligated to use only the care and diligence customarily exercised by a prudent operator in the area in which the land is located, and Operator shall not be liable in damages to Non-Operators for any act done or omitted in good faith in the performance of the provisions of this agreement or for errors of judgment or for loss or damage to any property and equipment owned by the parties hereto not resulting from the gross negligence or willful misconduct of Operator.

11. Resignation of Operator And Appointment Of Successor. Should Operator or any successor operator hereunder sell or otherwise dispose of its interest in the Joint Leases (except to a subsidiary, affiliated or successor company), it shall thereupon cease to be Operator hereunder. Operator or any successor operator may resign its duties as Operator hereunder. Should Operator or any successor operator for any cause cease to be Operator hereunder, the parties hereto, (including the successor or successors in interest of Operator) shall designate another Operator to act hereunder from among the parties hereto.

Should Operator or any successor operator hereunder resign as Operator, its rights, titles and interests in the Joint Leases shall be unaffected by such resignation, but it shall thereupon become one of the Non-Operators hereunder and shall thenceforth be bound by the terms and provisions hereof as a Non-Operator. Any party hereto designated as Operator to succeed the Operator herein named shall thereupon succeed to all the duties, powers, obligations, rights and authority given to the Operator herein named with respect to all operations of every kind thereafter conducted on the Joint Leases for developing and operating the leases and producing, treating, and handling of oil, gas and other minerals therefrom, as well as the payment of taxes and other charges which may arise or become due in connection with operations.

12. Rental Payments. Each party holding an oil and gas lease which is subject to this agreement shall, before the due date, pay all delay rentals which may become due under the lease or leases contributed by it. The burden and expense of paying such rentals shall fall entirely upon the party required to make payment thereof hereunder. In event of failure to make proper payment of any delay rental through mistake or oversight where such rental is required to continue the lease in force, there shall be no money liability on the part of the party failing to pay such rental; but such party shall make a bona fide effort to secure a new lease covering the same interest, and in event of failure to secure a new lease within a reasonable time, the interest of the parties hereto shall be revised so that the party failing to pay any such rental will not be credited with the ownership of any lease on which rental was required but was not paid.

13. Overriding Royalties, Oil Payments, Et Cetera. If any of the Joint Leases covered hereby are burdened with any royalties, overriding royalties, payments out of production, or any other charges in addition to the one-eighth (1/8) royalty, the party contributing any such lease shall

bear and assume same out of the interest attributable to it hereunder.

14. Abandonment Of Wells. In case any jointly-owned well or wells drilled hereunder shall hereafter prove to be a dry hole, Operator shall plug and abandon such well or wells and salvage all material and equipment therefrom for the benefit of the parties hereto in accordance with the provisions of "Exhibit B", attached hereto. No producing wells shall be plugged and abandoned without the mutual consent of the parties hereto, and if the parties are unable to agree upon the abandonment of any well or wells, then the party or parties not desiring to abandon such well or wells shall tender to the party or parties desiring to abandon same a sum equal to its or their proportionate share in the reasonable salvage value of the material and equipment in and on said well. Upon receipt of such sum, the party or parties desiring to abandon such well shall transfer and assign without warranty of title to the party or parties desiring to retain the same its or their interest in all of such material and equipment. By a separate assignment, also without warranty of title, the party or parties desiring to abandon such well shall also transfer and assign to the party or parties desiring to retain the same its or their interest in said leases as to the horizon or formation from which said well is then producing in and to the land attributable to said well by the well pattern on which said well was drilled.

Any such assignments shall vest the interest so assigned in the party or parties electing not to abandon any such well proportionately. The party or parties so assigning under this provision shall not be liable after delivery of such instruments for any cost or expense thereafter incurred in connection with such well, but it shall be liable for its proportionate part of the cost and expense incurred before the delivery of said instruments.

15. Loss Of Title. Any loss of title, whether partial or complete, as to any of the Joint Leases contributed by the

parties hereto, shall be borne entirely by the party contributing such Joint Lease as to which loss or failure of title occurs, and such party's interest in the Joint Leases shall be reduced in proportion to any such loss. In the event of loss of title to any of the Joint Leases, in whole or in part, or should any such lease terminate or be released and thereafter a party other than the party originally contributing such lease hereto makes such lease, or portion thereof or interest therein, subject to this contract, Operator shall reimburse the original contributing party out of such funds as may be collected from the new party (but only to the extent that such funds are collected from said new party) for loss suffered by reason of such original party's payment of its proportionate part of the cost and expense charged to the Joint Account by virtue of such lease, or portion thereof or interest therein, prior to the time same was lost by such original party.

16. Force Majeure. In the event any party hereto is rendered unable, wholly or in part, by force majeure to carry out its obligations under this contract other than the obligation to make payments of amounts due hereunder, it is agreed that, upon such party's giving notice and reasonably full particulars of force majeure in writing or by telegraph to the other parties hereto within a reasonable time after the occurrence of the cause relied upon, then the obligations of the party giving the notice, so far as they are affected by force majeure, shall be suspended during the continuance of any inability so caused, but for no longer period; and the cause of the force majeure shall, so far as possible, be remedied with all reasonable dispatch.

The term "force majeure" as employed herein shall mean any cause not reasonably within the control of the party claiming suspension.

The settlement of strikes and lockouts shall be entirely within the discretion of the party having the difficulty, and the above-mentioned requirement that any force majeure

shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of opposing party when such course is inadvisable in the discretion of the party having the difficulty.

17. Notices. All notices herein provided for shall be mailed or sent to Operator at P. O. Box 921, Bartlesville, Oklahoma and to Non-Operators as follows:

W. F. Snakard at P. O. Box 133, Wellston, Oklahoma.

18. Term. Unless terminated by agreement of all parties hereto, this contract shall continue in force and effect as long as the Joint Leases, or any of them, remain in force and effect, and thereafter until all materials and equipment have been salvaged or removed and a final settlement has been made between the parties hereto.

19. Parties Bound. This contract shall constitute a covenant running with the mineral estate or estates and, subject to the other provisions herein contained, is assignable and shall be binding upon the parties hereto and their heirs, successors and assigns. All parties hereto are referred to in the neuter gender.

Executed this the 11 day of November, A.D. 1954.

W. F. Snakard-11-11-54

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**Exhibit A**

(Omitted—see Appendix C1)

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**Exhibit B**

(Omitted—see T.R. 39 et seq)

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**APPENDIX C5**

Bartlesville, Oklahoma
October 14, 1954

Mr. W. F. Snakard, Wellston, Oklahoma.

Dear Mr. Snakard: Reference is made to our Letter of Agreement of October 12, 1954 relative to acquisition from you of an undivided $\frac{1}{2}$ interest in oil and gas leases covering all mineral interests in the land described in said Letter of Agreement.

It is understood that since executing said Letter of Agreement with you that you were unable to obtain leases on partial interest in the tracts set out below without giving the Lessor a $\frac{1}{4}$ royalty instead of the usual $\frac{1}{8}$ royalty.

Lease covering 10 acre interest out of an 80 acre tract described as the S/2 SE/4 Sec. 35, T15N, R2E, and; 5 acre interest out of an 80 acre tract described as the E/2 SW/4 Sec. 35, T15N, R2E and; 5 acre interest out of an 80 acre tract described as the N/2 SE/4 Sec. 35, T15N, R2E and; $2\frac{1}{2}$ acre interest out of an 80 acre tract described as the E/2 NE/4 of Sec. 35, T15N, R2E. All in Lincoln County, Oklahoma.

It is agreed this additional royalty payment will be absorbed by you and paid by you out of your $\frac{1}{2}$ interest in said leases.

If this represents your understanding of this Supplemental Agreement, please indicate your approval and acceptance in the space provided below and return the original and two copies to us.

Yours very truly,

Frankfort Oil Company
Leyton C. Frank, Manager
Land and Lease and Partnerships

Approved and accepted this 11 day of Nov., 1954 W. F. Snakard.

**APPENDIX C6**

Bartlesville, Oklahoma
October 14, 1954

Mr. W. F. Snakard, Wellston, Oklahoma.

Dear Mr. Snakard. This has reference to our Letter of Agreement of October 12, 1954 relative to your drilling a test well on a block of acreage which we have acquired a ½ interest from you covering Section 35 and SW 4 of Section 36, Township 15 North, Range 2 East and the W 2 of Section 2 and NE 4 of Section 3, Township 14 North, Range 2 East, Lincoln County, Oklahoma.

Said Letter of Agreement, is to be changed in the following respect:

1. Paragraph 1—in the third line, delete deepen an old hole in the NW SW SE and substitute in lieu thereof drill a well in the Center SW SE.

2. Paragraph 4 shall be deleted.

3. Paragraph 5—on Page 1 of said Agreement shall be modified in the following respect:

(a) In line 1 and 2, delete "to deepen the old hole" and substitute in lieu thereof, "to drill new hole".

If this represents your understanding of the modification agreed upon in said Letter of Agreement, please indicate your approval and acceptance thereto by signing in the space provided below and return the original and two copies to us.

Yours very truly,

Frankfort Oil Company
Leyton C. Frank, Manager
Land, Lease and Partnerships

Approved And Accepted This 14 Day of Nov., 1954.
W. F. Snakard

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[Summonses were issued December 20, 1955, setting out the answer date as January 23, 1956. Sheriff's returns show services on December 22, 1955.]

FILE COPY

Office-Supreme Court, U.S.
FILED
NOV 16 1960
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 488.**

W. F. SNAKARD,

*Petitioner,*

vs.

FRANKFORT OIL COMPANY,
a division of Joseph E. Seagram & Sons, Inc.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

MATTHIAS F. CORREA,
80 Pine Street,
New York 5, N. Y.
*Attorney for Respondent*

RICHARD P. LOFTUS,
JOHN W. NIELDS,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, N. Y.

T. MURRAY ROBINSON,
LEON SHIPP,
Hightower Building,
Oklahoma City 2, Okla.
*Of Counsel*

November 15, 1960.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 488.**

W. F. SNAKARD,

Petitioner,

*vs.*

FRANKFORT OIL COMPANY,

a division of Joseph E. Seagram & Sons, Inc.,

Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

### Opinions Below.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 279 F. 2d 436 and is also annexed as Appendix B to the petition.

The United States District Court for the Western District of Oklahoma rendered judgment without opinion. Its findings of fact and conclusions of law are unreported but are annexed as Appendix A to the petition and are also contained in the printed record at pages 115-21 and 124-26.

## Jurisdiction.

The judgment of the Court of Appeals is dated, and was entered on, May 18, 1960.

An extension of time until July 7, 1960 to file a petition for rehearing was granted. The petition for rehearing, applications for rehearing *en banc* and oral argument, and an alternative motion to remand to the trial court for findings or further proceedings, were denied on July 21, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958).

## Questions Presented.

I. May a United States Court of Appeals reverse a United States District Court without remanding the case with instructions to the District Court to make a finding on a matter of fact where no question was raised below in regard to the failure of the District Court to make a finding on the matter, where the finding sought by petitioner would not be supported by the record and would be inconsistent with the findings that had been made by the District Court and left untouched by the Court of Appeals, and where the proposition that the case should be so remanded was fully presented to the Court of Appeals on a petition for rehearing which was denied?

II. Did the Court of Appeals fail to follow Oklahoma law or otherwise fail properly to deal with petitioner's contentions with respect to the fiduciary and other obligations claimed by petitioner to be owing to him by respondent?

## Statement of the Case.

In October and November, 1954, petitioner and respondent executed various documents which are annexed to the complaint as Exhibits A-F (Pl. Ex. 1A-1B, R. 18-53, 69, 177, 565, 568; App. 29a-55a[1]). It is undisputed that they constituted in effect a single overall agreement.

In one of these documents, petitioner agreed to assign to respondent a ½ interest in twelve short-term oil and gas leases which petitioner had acquired in Lincoln County, Oklahoma (Finding No. 1, R. 116, App. 1a). The assignment was to be accomplished "forthwith" (R. 49, App. 29a). Respondent agreed to pay $1.00 an acre for its ½ interest (Finding No. 1, R. 116, App. 1a). Respondent also consented to assume half of petitioner's expenses relating to title examinations and curative measures (*ibid.*). Respondent further agreed that a test well would be drilled on the acreage at its sole expense and that petitioner would receive the drilling contract for the test well; the rate at which petitioner was to be paid thereunder was set at approximately twice the customary drilling cost in the area, and was fixed to enable petitioner to make a profit of approximately $20,000 for his work in acquiring the leases (Finding No. 2, R. 116, App. 1a).

Respondent also acquired a right of first refusal to purchase any portion of petitioner's interest which he might thereafter determine to sell (Finding No. 4, R. 116, App. 2a).

The parties further agreed that, if the test well were productive of oil or gas, respondent was to become the

---

[1] "R." is used herein to refer to the record as printed for the use of the court below and filed in this Court with the petition for writ of certiorari; "App." is used herein to refer to the appendices annexed to the petition; "P." is used herein to refer to the text of the petition.

operator of the leases (R. 27, App. 39a), under the terms of an attached operating agreement (R. 29-51, App. 41a-73a). The operating agreement as amended provided that production from the leases would be owned between the parties in the proportions of their interests in the leases, which were stated to be a 1/8th working interest for petitioner, and a 7/8ths working interest for respondent until it recouped its drilling costs, at which time respondent was to transfer a 3/8ths working interest to petitioner and each would thereafter own half (R. 27-28, App. 39a-40a; R. 30, App. 43a).

A number of the leases were to expire by their terms on July 1, 1955, but contained drilling clauses (Finding No. 5, R. 116, App. 2a), *i.e.*, the customary provision that commencement of drilling operations would extend them beyond that date.

The District Court (R. 120, App. 6a) and the Court of Appeals (279 F. 2d at 441, App. 21a) agreed that the test well was the only well which respondent had obligated itself to drill by execution of the agreements.

However, the agreements further provided that, after completion of the test well, if either party desired to drill a well upon any of the remaining leases, it was to give written notice to the other, who would then have ten days in which to decide whether to share in the costs of drilling the well (R. 32, App. 45a). If the second party chose to participate, the well was to be drilled for the joint account of the parties and the second party became obligated for half of the drilling costs and entitled to half the proceeds of production (Finding No. 3, R. 116, App. 1a).

If the second party determined not to participate, the first party was at liberty to drill the well at its own cost and expense (R. 32, App. 45a).

Under the terms of the contracts, if petitioner elected not to participate, he was under no obligation to share

the drilling costs and, if the well were a dry hole, the drilling costs would be borne solely by respondent (*ibid.*). If such a well were productive, however, petitioner was to own the same share of production as from the test well, *i.e.*, 1/8th of the working interest until respondent had recouped its costs, and 1/2 of the working interest thereafter (Finding No. 3, R. 116, App. 1a-2a).

In contrast, if respondent elected not to participate and petitioner then drilled a productive well, respondent would have no interest whatever in such well (*ibid.*).

The test well, while not a producer, indicated that the area was potentially productive (Finding No. 6, R. 117, App. 2a). A second well, designated the Erwin No. 1, was then drilled and was completed as a producer in February, 1955 (Finding No. 9, R. 117, App. 3a).

By this time relations between petitioner and respondent had become strained. In part this had resulted from the commencement of a suit against petitioner by one Burkett who claimed an interest in the leases which petitioner had agreed to assign to respondent (Finding No. 7, R. 117, App. 2a; R. 421-23). Pending the outcome of this litigation, respondent withheld a portion of the funds due petitioner (*ibid.*).

In addition, despite the contractual requirement that petitioner assign a 1/2 interest in the leases to respondent "forthwith" (R. 19, App. 29a), petitioner had refused to execute such assignments except as to leases on which respondent drilled a well (Finding No. 23, R. 120, App. 6a; R. 423-24). Respondent's interest in such other leases was therefore unrecorded and unprotected. Respondent continued to press petitioner for such assignments and petitioner persistently refused (R. 424, 433). On March 8, 1955, respondent, on the advice of counsel, filed of record a "caveat" which referred to the contracts, described the

leases covered by the contracts and asserted that respondent had a 7/8ths working interest in these leases (Finding No. 12, R. 117-18, App. 3a; Pl. Ex. 19, R. 15-16, 177, 589).

The effect of the caveat was to inform the world of respondent's interest in the leases and as a corollary to prevent petitioner from representing to those who might otherwise be interested in working the leases with him that he had an unencumbered right to contract with them so far as working interests in the leases were concerned.

At no time did petitioner take any steps to have the caveat stricken from the record, other than to include in the general prayer for relief in this action a plea for judgment "quieting title on the leases" (R. 18, 69).

The producing well, the Erwin No. 1, was located in the west central portion of the lease area (Pl. Ex. 7, R. 666. 915). Respondent had substantial geological information which indicated the desirability of drilling to the south (Finding No. 16, R. 118, App. 4a). Respondent also had geological information which indicated the desirability of drilling to the northeast (Finding No. 22, R. 119, App. 5a; R. 335, 345, 349-50, 405, 447-48).

M. R. Shaffer, respondent's general manager during this period and until the termination of his employment in August, 1956 (R. 325-26), concluded that it was preferable to drill to the north and east. He thereupon undertook an extensive drilling program to the north and east of the Erwin No. 1 well, drilling six additional wells at a cost to respondent of several hundred thousand dollars (R. 329-35, 650). One was a producer; four were non-commercial producers; one was a dry hole (Findings Nos. 20-22, R. 119, App. 5a; R. 329-35).

Early in the course of this drilling program, the Inland Oil Company proposed to Shaffer a "farm-out" to itself of portions of the leases to the south, *i.e.*, the Thomas and

Christian leases[1] (R. 331; Pl. Ex. 17-B, R. 177, 586-87; Finding No. 10, R. 117, App. 3a). Under the terms of this proposal, Inland was to drill at its sole expense a test well on each of those leases (Pl. Ex. 17, R. 177, 583-85). Had the wells been dry holes, Inland would have borne the loss itself (*ibid.*). Had the wells been producers, Inland would have received half of the working interest in eighty acres of the Thomas lease and in forty acres of the Christian lease; respondent and petitioner would have divided the remaining half equally between them (*ibid.*). This proposal was acceptable to Shaffer (Finding No. 10, R. 117, App. 3a). Petitioner, however, rejected it, restating his belief that the best drilling prospects lay in those leases and demanding that respondent pay him an additional $90,000 to join in the arrangement[2] (R. 155-58, 179). This respondent refused to do.

On July 1, 1955, the date on which the Thomas and Christian leases were to expire if drilling operations were not commenced, petitioner, without notice to respondent in violation of the terms of the contracts, commenced drilling operations thereon (Finding No. 26, R. 120, App. 6a; R. 104-05, 696).

Petitioner continued drilling operations on the Christian lease until after the caveat had been released with respect to that lease by an instrument dated March 12, 1956, filed April 19, 1956 (R. 100, 104, 220; Pl. Ex. 28, R. 168; R. 631, 712).

Petitioner continued drilling operations on the Thomas lease through the greater part of 1956, and, in October, 1956, completed a producing well on this lease, which, peti-

[1] It is for the loss of the Thomas and Christian leases, by virtue of petitioner's failure to continue drilling operations thereon or sale of his interest therein, that this suit seeks damages.

[2] Previously, Inland had unsuccessfully offered $100,000 for petitioner's interest in the entire lease block (R. 145-46; Finding No. 10 R. 117, App. 3a).

tioner testified, was "the best well in the field" (R. 104-06, 709). The caveat had been released with respect to that lease by an instrument dated February 6, 1956 (Pl. Ex. 27-A, R. 168, 629).

Respondent did not acquire any interest (other than as provided in the agreement with petitioner) in the Thomas or Christian leases or in any other leases covered by the agreement with petitioner (Finding No. 27, R. 120, App. 6a).

## Argument.

The decision of the District Court was based upon the conclusions (a) that respondent had breached its contractual obligations to petitioner by failing to drill certain leases which it had elected to drill and by filing the caveat reflecting its interest in the leases involved (Conclusions of Law Nos. 4 and 5, R. 120-21, App. 7a), and (b) that respondent had breached its fiduciary obligations to petitioner by not sufficiently revealing its geological information, by overreaching petitioner by misrepresentation in connection with the proposed farm-out, and by unwarrantedly claiming it 7/8ths interest in a lease through the filing of the caveat (Conclusion of Law No. 6, R. 121, App. 7a).

The decision of the Court of Appeals was based upon the conclusions that the pertinent relationships between the parties were fully comprised in the multiple agreement between them, and that respondent had acted well within the terms of this agreement, stating in the concluding sentence of its opinion, "We can neither rewrite the contracts for the parties nor protect Snakard from the results of the contracts which he made." (279 F. 2d at 445, App. 23a) Accordingly, the decision of the District Court was "reversed with directions to enter judgment in favor of defendant Frankfort." (*Ibid.*)

The central questions raised on this petition for certiorari—the collateral claim of malice in filing the caveat and the claim of violation of fiduciary obligations under Oklahoma law—were fully presented to the Court of Appeals on petition for rehearing, together with the claim that the case should be remanded for a further finding on malice. The petition was denied.

## I.

### The Court of Appeals properly reversed without remanding for further findings.

The petition for certiorari (P. 25-26) claims in one breath that the District Court made a finding of malice, in the next that the Court of Appeals should remand so the District Court could make such a finding, and in the next that the Court of Appeals has usurped the function of the District Court by making a finding of no malice.

The record on the point is as follows.

Conclusion of Law (*not Finding of Fact*) No. 5 of the District Court says:

> "If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract.
>
> Whether defendant improperly clouded plaintiff's title to coerce plaintiff into approving the controverted farm-out, or for some other reason not apparent in the record is immaterial. This was an act contrary to defendant's rights under the agreement

and encroached upon plaintiff's contractual rights, separate and apart from the fiducial relationship." (R. 121, App. 7a)

The Court of Appeals said:

"Snakard contends that Frankfort slandered his title by filing the caveat for record. A lawyer for Frankfort testified that he filed the caveat to protect Frankfort's interests because Snakard had not executed all of the lease assignments to which Frankfort was entitled. The caveat referred to the 1954 contracts, described the leased land, and claimed a ⅞ interest in the leases for Frankfort. The agreements themselves could have been filed. The caveat is no more objectionable than the agreements, except for the claim of a ⅞ interest. By the contracts, as to all wells after the first, Frankfort, in wells in which Snakard elected not to participate, had a ⅞ interest until reimbursed up to 200% of Snakard's share of the drilling costs. Thus, in some instances, Frankfort's interest was ⅞ and in some ½.

The Oklahoma rule is that the principal element in a suit for slander of title is malice. By filing the caveat Frankfort was asserting an interest in the properties under its contracts with Snakard. It had a right to do this unless it was actuated by some wrongful motive which would establish malice. The question of malice is for the trier of the facts. The case at bar was tried to the court and the court made no finding of malice. No question is raised by Snakard in regard to the omission of such finding. It follows that the judgment cannot be sustained on the theory of slander of title." (279 F. 2d at 443, App. 24a) (Footnotes omitted)

Thus, it is entirely clear that the District Court made no finding of malice and that the Court of Appeals clearly recognized that the making of findings was for the District Court and did not usurp that function.

Furthermore, the findings of fact which were made by the District Court conclusively establish the absence of malice.

The Court of Appeals upheld the findings of the District Court in full. It vacated none of them, expressly or impliedly. It had before it a record sufficient to enable it finally to dispose of the case. The findings as entered by the District Court were even expressly approved by the attorney for petitioner (R. 126, App. 14a).

The findings of the District Court in this case, which the Court of Appeals openly accepted and on which it rested its opinion, fully meet the test of the cases cited by petitioner, *e. g.*, *Kelley* v. *Everglades Drainage District*, 319 U. S. 415. They establish beyond a doubt that no malice was involved in the filing of the caveat by respondent.[1]

Under Oklahoma law concerning slander of title by assertion of a claim to another's property, malice is held to exist only where defendant has asserted a claim in which he has no reasonable basis for belief. If defendant is acting in good faith, there is no recovery, *Ward* v. *Mid-West & Gulf Co.*, 97 Okla. 252, 223 Pac. 170 (1923).

Here the findings of the trial court demonstrate that respondent had ample justification for its action in filing the caveat. Assignments of a ½ interest in the leases, for which respondent had paid in advance, were long overdue yet petitioner was still persistently refusing to execute them (Finding No. 1, R. 116, App. 1a; Finding No. 23, R. 120, App. 6a; R. 423-24, 433). Respondent's ½ interest therefore lay at the mercy of petitioner, unrecorded and completely unprotected against third parties. Equally unrecorded and

[1] The test of the adequacy of findings is not, as petitioner would contend, whether there is a finding on each and every possible point, but whether the findings when viewed as a whole are sufficient to indicate the basis of a decision.

unprotected was respondent's right of first refusal in the event of sale of petitioner's ½ interest (*ibid.*). And petitioner's rights in the leases were already under attack in the litigation brought by Burkett (Finding No. 7, R. 117, App. 2a; R. 421-23).

Respondent therefore determined to protect its interest. In pursuance of that determination, and pursuant to advice of counsel, it filed the caveat (Finding No. 12, R. 117-18, App. 3a; Pl. Ex. 19, R. 15-16, 177, 589). That document referred to the contracts, described the leases, and warned any purchaser that respondent claimed a ⅞ths interest in the leases (*ibid.*).

Although the courts below have suggested that the caveat may have misstated respondent's interest in the leases by claiming a ⅞ths interest rather than a ½ interest (279 F. 2d at 443, App. 24a; R. 121, App. 7a), the contract involved gave respondent a present ⅞ths interest, subject to reduction to a ½ interest either by petitioner's election to participate or by respondent's recoupment of drilling costs from petitioner's proportionate share if petitioner chose not to participate (R. 27-28, App. 39a-40a; R. 30, App. 43a). Only in the event that petitioner made the original decision to drill a particular lease would respondent's initial interest have been less than a ⅞ths working interest. However, petitioner had informed respondent that he had no intention of doing so (R. 434). In any event, it is not contended that any claimed injury to petitioner arose from this difference in fractions.

The District Court found that the caveat had been filed "pursuant to advice of counsel" (Finding No. 12, R. 117-18, App. 3a). In fact, the Court of Appeals noted, "a lawyer for Frankfort testified that he filed the caveat [himself] to protect Frankfort's interests because Snakard had not executed all of the lease assignments to which Frankfort

was entitled.'"[1] (279 F. 2d at 443, App. 24a; R. 437) It has never been suggested that the lawyer's advice or action was given or taken in other than good faith.

This in itself is sufficient to establish that respondent acted without malice. *New England Oil & Pipe Line Co.* v. *Rogers*, 154 Okla. 285, 7 P. 2d 638 (1931). That opinion, after stating in the passage quoted by petitioner (P. 38-39) that a presumption of malice might be drawn in certain circumstances, also pointed out that other circumstances could rebut the presumption:

> "'To rebut evidence of malice defendant may show that he was advised by counsel, upon a fair representation of his claim, as to the course to be pursued in the protection of its rights. It must appear, however, that the defendant truthfully disclosed to his counsel all the material facts within his knowledge.'" (7 P. 2d at 643)

No contention is made here that respondent withheld any information from its counsel, whom the District Court called respondent's "attorney and active representative" (Finding No. 15, R. 118, App. 4a; R. 425).

Obviously, instead of the caveat, the contracts themselves could have been filed. They were not filed because of their bulk (R. 437). The caveat merely gave notice of the underlying contracts, as petitioner's attorney recognized[2] (R. 580-81). Petitioner is seeking to build a cause of action on the filing of the caveat which he would not have had if the agreements had been filed; although the effect upon him would have been the same.

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[1] Petitioner's point (P. 30-31) that the issue of malice depended on an assessment of the credibility of witnesses is not well taken. The testimony concerning respondent's reasons for filing the caveat was undisputed.

[2] During the entire period in which the caveat was on file, petitioner took no legal steps to have it stricken, although he was presumably in constant contact with his lawyers because of the several lawsuits in which he was then engaged (R. 180, 421, 733).

The foregoing makes it crystal clear that not only did the District Court fail to make an express finding of malice, but that it could not have done so in harmony with its other findings. Such a finding, if made, would have had to have been vacated by an appellate court.[1]

It is also to be noted that petitioner has failed to select any evidence from the record which he thinks would support a finding of malice; nor has he referred the Court to any offers of relevant evidence which were rejected.

It is only by making the untenable assertion that a specific finding containing the term "malice" one way or another is necessary to the final disposition of this case that petitioner can build the asserted "conflict" with other circuits. An examination of the cases cited at pages 26-30 of the petition discloses that none of them lends support to the contention petitioner makes here.

In *Paramount Pest Control Service* v. *Brewer*, 177 F. 2d 564 (9th Cir. 1949), the District Court had made detailed findings of fact and conclusions of law. They were accepted by the Court of Appeals and the decision of the lower court was affirmed. In *Helfer* v. *Corona Products, Inc.*, 127 F. 2d 612 (8th Cir. 1942), the District Court had entered neither findings of fact nor conclusions of law; however, the Court of Appeals was able to "infer" the amount of damages from the master's report and the District Court's opinion and it directed entry of that amount as final judgment.

In *Burrell* v. *Martin*, 232 F. 2d 33 (D. C. Cir. 1955), the Civil Service Commission had failed to make an essential

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[1] The Court of Appeals did not reverse judgment below because petitioner had failed to request any particular finding as contended by petitioner (P. 35-37). The Court of Appeals must have simply concluded that petitioner had tried his case to his satisfaction and was satisfied with the findings that were made. Otherwise the record would disclose some objection, and as set forth above, the findings of fact which were made adequately covered the point and conclusively rebut any malice.

finding of fact in a loyalty investigation; summary judgment reversing the Commission's order ousting the plaintiff from her civilian position with the Army was therefore directed.

In seven other cases, the District Court had made no findings of fact at all; its decision was therefore reversed and the case was remanded for findings. In one case[1] the District Court had not even written an opinion from which the Court of Appeals could deduce the grounds of its decision. In another[2] there was a memorandum opinion of the District Court but no facts were set out in it. In the other five decisions[3] there is no mention of even a memorandum opinion below.

In the balance of the cases cited by petitioner, the District Court had either made separate findings of fact[4], or had stated them in the course of its opinion[5], but had done so inadequately and had failed to determine the factual issues which the Court of Appeals found critical.

Petitioner also cites (P. 29) *United States* v. *Horsfall*, 270 F. 2d 107 (10th Cir. 1959), as an asserted illustration of the claimed practice of the Court of Appeals for the Tenth

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[1] *Fletcher* v. *Fletcher*, 219 F. 2d 768 (D. C. Cir. 1955).

[2] *Hook* v. *Hook & Ackerman, Inc.*, 213 F. 2d 122 (3d Cir. 1954).

[3] *Hopkins* v. *Wallin*, 179 F. 2d 136 (3d Cir. 1949); *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341 (5th Cir. 1950); *Victory Towing Co.* v. *Bordelon*, 219 F. 2d 540 (5th Cir. 1955); *Bach* v. *Friden Calculating Mach. Co.*, 148 F. 2d 407 (6th Cir. 1945); *Kweskin* v. *Finkelstein*, 223 F. 2d 677 (7th Cir. 1955).

[4] *Stella* v. *Graham-Paige Motors Corp.*, 232 F. 2d 299 (2d Cir. 1956), *cert. denied*, 352 U. S. 831; *Hunter* v. *Scruggs Drug Store, Inc.*, 113 F. 2d 971 (4th Cir. 1940); *Indemnity Ins. Co.* v. *Midwest Transfer Co.*, 184 F. 2d 633 (7th Cir. 1950); *Irish* v. *United States*, 225 F. 2d 3 (9th Cir. 1955); *Deering-Milliken & Co.* v. *Modern-Aire of Hollywood, Inc.*, 231 F. 2d 623 (9th Cir. 1955); *Campbell* v. *Campbell*, 170 F. 2d 809 (D. C. Cir. 1948).

[5] *United Shoe Mach. Corp.* v. *Kamborian*, 160 F. 2d 461 (1st Cir. 1947); *City of Sumter* v. *Spur Distributing Co.*, 110 F. 2d 649 (4th Cir. 1940).

Circuit of supplying omitted findings on essential issues of fact. That was a personal injury action in which the District Court had awarded plaintiff $17,550 for future loss of time and $45,000 for permanent disability. Since there were no special findings concerning permanent disability, the Court of Appeals found it reasonable to assume that the lower court had included lost earnings in the award for permanent disability, and there was a duplication. Alternatively, if the lower court had intended the award for loss of time to cover a period of temporary total disability it was without support in the record; if the award for permanent disability were intended to supplement lost earnings, it was excessive. The court accordingly directed that plaintiff remit $17,550 of the judgment or submit to a new trial on the issue of damages.

It is apparent that petitioner's attack on that case is simply an attack on the practice of remittitur, which practice is long established in personal-injury actions in the federal courts, *Dimick* v. *Schiedt*, 293 U. S. 474, 482-85.

The foregoing also disposes of petitioner's contention that the Court of Appeals failed to follow the case law of Oklahoma by ignoring "the plain meaning of the trial court's findings and conclusions" (P. 37). As has been demonstrated, the findings of fact of the District Court were precisely the basis on which the Court of Appeals did rest its decision. Those findings clearly established the absence of malice under Oklahoma law, *New England Oil & Pipe Line Co.* v. *Rogers, supra; Ward* v. *Mid-West & Gulf Co., supra.*

The *New England* decision holds, in effect, that the advice of counsel is a "justifiable motive" within the meaning of section 1445 of Title 12 of the Oklahoma statutes, relied on by petitioner (P. 38). That statute provides a presumption of malice only in the absence of such a motive.

Petitioner also asserts that "a general finding for plaintiff in a slander of title action amounts to a finding of malice. . . ." (P. 37) However, there was no such general finding by the District Court in this case. Petitioner tried his case, not as a slander of title action, but on the theory of a breach of contract, and damages were assessed on that basis (R. 122, App. 8a; R. 125, App. 11a). Even on that theory, the specific findings established that respondent acted without malice in filing the caveat. The case cited by petitioner, *Wilkerson* v. *Wasson*, 110 Okla. 66, 235 Pac. 206 (1924), does not aid him. There was no general finding in that case from which malice could be implied. To the contrary, the Oklahoma court found that the defendant had not acted in good faith but had filed the disputed document solely for purposes of extortion.

Finally, in the light of petitioner's full presentation to the Court of Appeals in its petition for rehearing of the very arguments with respect to malice now advanced in its petition for certiorari, it can be concluded that the Court of Appeals fully considered the matter and decided on the entire record before it that nothing would be gained by remand, *i.e.*, that no finding of malice could be supported.

## II.

**The Court of Appeals properly dealt with Oklahoma law and with the asserted fiduciary and other obligations of respondent.**

Petitioner complains (P. 39-42) that the Court of Appeals failed to follow Oklahoma law in assessing the obligations toward each other of petitioner and respondent. Petitioner asserts that the following is the law of that state:

> "Joint venturers are fiduciaries and owe each other the utmost good faith." (P. 40)

This is exactly what the Court of Appeals found to be the applicable law:

> "The relationship so created was fiduciary in character and required the utmost good faith on the part of both parties." (279 F. 2d at 443; App. 25a)

The Court of Appeals also recognized that the scope of any obligation, including a fiduciary obligation, cannot be determined *in vacuo*. Accordingly, it went on to note that:

> "The extent and effect of such relationship is determined by the written agreements between the parties defining and delineating the powers and rights of each. In such a situation it is presumed that they delegated all the powers they wished to confer upon each other and withheld all powers or authority not affirmatively delegated. The relationships between them are controlled by the terms of their agreements voluntarily made." (*ibid.*) (Footnotes omitted)

The conclusion of law (*not Finding of Fact*) of the District Court with respect to the asserted fiduciary obligations of respondent reads as follows:

> "Moreover, defendant Frankfort breached its fiducial duty owed plaintiff by failing to fairly and openly reveal the geological information it possessed directly bearing on the agreement's subject matter, by overreaching plaintiff in connection with the proposed farm-out to Inland in affirmatively misrepresenting the location of the second Wilcox producing structure, and by unwarrantedly claiming a 7/8ths interest in this lease block through the caveat placed of record on March 8, 1955." (Conclusion of Law No. 6; R. 121, App. 7a)

The Court of Appeals dealt with the subject matter of this conclusion of law most carefully and most fully (279 F. 2d at 443-45, App. 25a-28a).

The Court of Appeals held that respondent did not breach any fiduciary duty to petitioner with respect to the geological information it possessed (a) because respondent had no contractual obligation to divulge that information, (b) because the record showed that petitioner had his own opinion as to the significance of matters of geological information, which opinions were different from those of respondent, and (c) accordingly, petitioner could neither have been misled nor overreached.

The Court of Appeals held that petitioner had not been overreached in connection with the proposed farm-out to Inland (a) because as stated above petitioner had his own geological conclusions, and (b) because of his own volition he elected not to pursue them at that time, although given an opportunity to do so.

The Court of Appeals held that respondent did not breach any fiduciary duty to petitioner in filing the caveat, both for the reasons set forth in Point I above and because respondent had a clear right to give notice of its interest in the property.

In this branch of the argument, petitioner is simply complaining that the Court of Appeals reversed the District Court on the conclusions to be drawn from the record as a whole. If this sort of action on the part of the Court of Appeals is to be ground for review by this Court by petition for certiorari, this Court would have to review virtually every case in which a Court of Appeals reverses a District Court.

Petitioner's final argument (P. 42-45) appears to complain of the fact that nobody below considered the case on the legal theory that an intentional injury was inflicted upon him by respondent "without just cause and excuse."

No such theory was advanced to the District Court and no such theory was advanced to the Court of Appeals, either

in connection with the argument of the appeal or in the petition for rehearing. .

Furthermore, as petitioner's argument discloses, the theory seems to be inexplicably intertwined with a "malicious wrong", and, in any event, the subject matter of this theory is fully disposed of by the opinion of the Court of Appeals.

## Conclusion.

The decision of the Court of Appeals was based on findings of fact made by the District Court and left undisturbed by the Court of Appeals, and on an accurate application of the relevant law of Oklahoma. No issue is tendered which is appropriate for consideration by this Court. It is submitted that the decision below was in all respects correct and that the petition for writ of certiorari should be denied.

Respectfully submitted,

MATHIAS F. CORREA,
80 Pine Street,
New York 5, N. Y.
Attorney for Respondent.

RICHARD P. LOFTUS,
JOHN W. NIELDS,
WILLIAM A. JANSEN,
80 Pine Street,
New York 5, N. Y.

T. MURRAY ROBINSON,
LEON SHIPP,
Hightower Building,
Oklahoma City 2, Okla.
Of Counsel.

November 15, 1960.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1960

No. 488

W. F. SWAKARD, *Petitioner*,

v.

FRANKFORT OIL COMPANY, a division of Joseph E. Seagram & Sons, Inc., *Respondent*.

## REPLY

PEYTON FORD
1000 Connecticut Ave., N. W.
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*

FORD, LARSON, GREENE
AND HORAN
Washington, D. C.

JOHN B. DUDLEY, JR.
DUDLEY, DUDLEY & DUDLEY
Oklahoma City, Oklahoma

CLYDE J. WATTS
LOONEY, WATTS, LOONEY
& NICHOLS
Oklahoma City, Oklahoma

P. D. ERWIN
Chandler, Oklahoma

PETERS PRINTING CO., BYRON S. ADAMS, WASHINGTON, D. C.

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## REPLY

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Respondents' Brief in Opposition fails to meet the important questions raised in the Petition. It advances instead the theory that the Tenth Circuit Court of Appeals in reversing the judgment the District Court had awarded petitioner "upheld the findings of the District Court in full." (Br. Op. p. 11) To support this theory respondent puts forward erroneous interpretations of the facts and the law involved. In some instances it omitted discussion of important points raised in the Petition. For example, the status of the caveat *after* July 1, 1955, when the joint venture ended, is not mentioned. This and other errors and misinterpretations require petitioner to reply.

## I. THE CAVEAT MUST BE CONSIDERED BOTH BEFORE AND AFTER JULY 1, 1955

The most noticeable omission by respondent is its failure to perceive that the slander of title cause of action is divided into two aspects, (1) before July 1, 1955, and (2) after July 1, 1955. The caveat was filed by respondent on March 8, 1955, and remained of record until the early months of 1956, although respondent's interest in the undrilled leases ceased on July 1, 1955. As initially filed, the caveat wrongfully asserted a $\frac{7}{8}$ interest in the leases of the joint venture when its true interest was only a $\frac{1}{2}$ interest. Respondent disarmingly terms this misrepresentation only a "difference in fractions" (Br. Op. p. 12), and further argues that the joint venture contract could have been filed instead and would have done no greater harm. But the contract itself would have indicated to anyone examining the records that petitioner had a $\frac{1}{2}$ interest in the undrilled leases, that Frankfort could only acquire a *temporary* $\frac{7}{8}$ interest *if* it drilled a lease *and* achieved oil production *and* petitioner had elected not to participate.

Respondent further argued that the caveat could not be malicious since it was filed on "advice of counsel." Even if this were a good defense, how does the fact, omitted in the Brief in Opposition, that the same counsel subsequently advised respondent in June, 1955, *to release the caveat* (T.R. 439) affect respondent's assertion of this alleged defense? The trial court found as a fact that respondent's attorney had so advised it. (Fdg. 24, App. p. 6a).

Whatever basis respondent had for asserting a defense of "advice of counsel", it was destroyed when that same counsel countermanded his advice and ad-

vised Frankfort instead to remove the caveat. Among that counsel's reasons for reversing himself was the weakness of the grounds for his original advice, which respondent has left out of its Brief.

One basis offered in The Brief in Opposition for the original "advice of counsel" is petitioner's purported refusal to execute assignments of the various leases to Frankfort and, as another, the Burkett lawsuit against petitioner is put forward. (Br. Op. pp. 5 and 11)

At page 5 respondent asserted that the petitioner "refused" to execute assignments of the leases to respondent citing to the trial court's Finding No. 23. Finding 23 reads:

> "23. Plaintiff assigned to defendant a one-half interest in each lease on which defendant drilled a well; however, the defendant received no such assignment as to the undeveloped leases."

Respondent's attorney on direct examination asserted that petitioner had refused to make the assignments; however, on cross examination he admitted that on December 28, 1954, he sent a letter to petitioner (P. Ex. 18, T.R. 588), stating that he would prepare the assignments for execution by petitioner; he further admitted that up to March 8, 1955, the date of the caveat, he had only sent two such assignments to petitioner, both of which were promptly executed, and that he had never written any other letters to petitioner requesting assignments. (T.R. 430-431). The trial judge found that petitioner fulfilled all of his contract obligations. (Fdg. 28, App. p. 6a)

At page 11, respondent further offers the fact that "petitioner's rights in the leases were already under attack in the litigation brought by Burkett" as a basis

for the caveat. The following is an excerpt from a letter of January 27, 1955 (Pl. ex. 53, T.R. 647), from Burkett's attorney to respondent's attorney:

> "This is to advise you that the plaintiff Gordon Burkett insofar as any claim that he has to said lease is concerned, will fully honor the contract or contracts above referred to entered into between your company and W. F. Snakard, and that any interest that Gordon Burkett might be entitled to receive in and to said lease will be subject to the terms and conditions of said contract. . . ."

A similar letter was sent on March 2, 1955 (Pl. ex. 54, T.R. 648), reaffirming the January 27 letter.

The second advice given by counsel to respondent disposes of the alleged defense. But the preceding three paragraphs show that the original advice was unjustified. These points were brought out at trial from the counsel in question. (T.R. 430 et seq.) The trial judge must have considered them as throwing considerable doubt upon the "good faith" assertions of respondent.

The omissions by respondent in treating the circumstances involved in the preceding paragraphs cannot be regarded as minor, but respondent's brief failed to consider a much more vital point: the status of the caveat after July 1, 1955. The caveat was a slander of title before July 1, when respondent claimed a greater interest than it had, but after that date, it claimed a $\frac{3}{4}$ interest when it had none at all. *On July 1, 1955, the joint venture expired.* It expired when the leases it was created to develop expired. As of that date, respondent ceased to have any interest at all in any of the leases it had failed to drill. As of that date the "difference in fractions" in the caveat increased

from about 50% to 100%. Frankfort owned nothing, but the caveat told "the world" from July 1, 1955, until February and March, 1956, that Frankfort owned 7/8 of the leases which petitioner tried to save after many fruitless efforts to have Frankfort develop them. Petitioner for months earnestly tried to get Frankfort first to drill the rich Thomas and Christian leases, then to release the caveat so that he could get capital to do it himself. Against the duty raised by the fiducial joint venture, against the advice of its attorney, respondent wilfully refused and effectively prevented petitioner from obtaining the money he needed to succeed on those leases. Such was the trial court's finding in assessing the damages. The leases were lost by the petitioner "as a result of the acts and omissions of the respondent". (Fdg. 30(a)(1), App. p. 12a)*

## II. A REAL CONFLICT EXISTS

Respondent's treatment of the cases advanced by petitioner to demonstrate the conflict between the Tenth Circuit and the other circuits is completely negative. Not a single case in agreement with the Tenth Circuit is cited in the Brief in Opposition. In discussing the cases cited by petitioner, respondent misunderstands the ones it attacks individually, *Paramount*, *Helfer* and *Horsfall*, and leaves the other sixteen cases unchallenged.

At page 14 respondent makes the rather amazing statement that none of the cases cited in the Petition as being in conflict with this case, lend support to petitioner's case. Respondent begins with *Paramount Pest Control Services* v. *Brewer*, 177 F. 2d 564. It asserts that the District Court had made detailed findings

* References to appendix are to the appendix of the Petition

of fact and conclusions of law and infers that, therefore, this case is not in conflict. If respondent had troubled itself to read beyond the headnote, it might have discovered that the language quoted from that case in the Petition referred to the court's previous disposition of that case when it had remanded it to the District Court to supply omitted findings. The same case had already been up to the Court of Appeals and remanded for the findings referred to in the opinion cited. The remanding decision may be found at 170 F. 2d 553.

The second case treated by respondent is *Helfer v. Corona Products, Inc.*, 127 F. 2d 612. As stated at page 28 of the Petition, the Court of Appeals in the *Helfer* case did not remand for findings because "it had been a protracted litigation, the appellant was appealing in forma pauperis, and he had urged the court to treat the report of the master and the opinion of the trial court as in compliance with rule 52." At page 615 of the court's opinion, the court stated: "... in ordinary course we should be required to review the decree and remand ...". In a subsequent case, *Omaha Hardwood Lumber Co. v. J. H. Phipps Lumber Co.*, 135 F. 2d 3, 10, the Eighth Circuit reaffirmed its position when it remanded for findings as to fraud even though it was not certain that a finding thereon would dispose of the suit.

In all the other cases which respondent asserts fail to lend support to the question raised by petitioner, each and every court found that essential facts had not been found by the trial court and remanded to have the findings made. The principle prevails whether the trial court makes no findings or omits findings on "factual issues which the Court of Appeals found critical."

The latter quotation is from page 15 of respondent's brief and in connection therewith we think the respondent precisely stated petitioner's contention. The Tenth Circuit found the question of malice "critical".

Finally, respondent asserts at page 15 that petitioner's citation of *United States* v. *Horsfall*, 270 F. 2d 107, as another example of the Tenth Circuit's misinterpretation of Rule 52 was only an attack on the practice of remittitur. This is wholly in error; remittitur is not in question. Respondent has failed to grasp that the *Horsfall* case was a *non-jury* case, thus falling under the fact finding requirements of Rule 52. The Court of Appeals could have exercised its power to remit had it found that a trial court finding was clearly erroneous. As the court itself said (270 F. 2d at 109), "We have no doubt as to our power to review excessive awards of damages . . . . if we are convinced that they are clearly erroneous. *It is impossible for us to make any such determination here as we cannot ascertain from the findings how the trial court gave effect to an important element of damage.*" (Emphasis added.) Then the Court of Appeals ruled the damages excessive and remanded, not for the omitted finding but for plaintiff to remit $17,550 or face reversal and a new trial.

The correct practice under Rule 52 in cases of this sort is exemplified by another *non-jury* case, *Alexander* v. *Nash-Kelvinator Corporation*, 261 F. 2d 187 (CA 2), and *Alexander* v. *Nash-Kelvinator Corporation*, 271 F. 2d 524 (CA 2). This was an automobile negligence case and the trial court failed to make its damages findings "with sufficient particularity." In its first opinion the Second Circuit remanded for specific

findings of fact as to damages by the trial court and stated its reasons for doing so as follows:

> "This court is mindful of the principle so frequently reiterated that the question of the excessiveness of a jury verdict is to be determined by the trial court on a motion for a new trial. In such cases the trial court, in effect, occupies the position of a reviewing judge. He has the power to pass upon, set aside or even refuse by remittitur excessive awards. Where a case is tried by a judge without a jury the defendant is deprived of this right. The first opportunity which an aggrieved defendant has in this respect in a non-jury trial is upon appeal. *For these reasons it becomes most important that the trial court comply meticulously with the requirements of Rule 52(a) with respect to findings so that the appellate court can properly appraise the elements which entered into the award.* Just as the trial judge passes upon possible passion or prejudice and all the other legal grounds for attacking excessive damages on the post-trial motion to set aside a jury verdict so on the appeal the appellate court should have some knowledge of the basis or theory upon which the trial judge acted. Without this information the defendant is unable properly to exercise the appellate rights conferred by statute and the court is equally unable to make appropriate appellate review." (261 F. 2d at 191.) (Emphasis added.)

That case then went back to the trial court and findings were made. It was returned to the Second Circuit Court of Appeals which then exercised its power of remittitur upon deciding some of the findings as to damages to be "clearly erroneous". This is the correct procedure and the one which Rule 52 obliges the Courts of Appeals to follow. The Tenth Circuit did not follow it in the *Horsfall* case any more than it followed the requirements of the Rule in this case.

## III. RESPONDENT'S NEW INTERPRETATION OF THE CONTRACT IS WRONG

On page 12 of its brief, respondent gives a completely incorrect interpretation of the joint venture, an interpretation never before attempted. It asserts that respondent had a "present 7/8ths interest" in all of the leases "subject to reduction to a 1/2 interest" by "petitioner's election to participate or by respondent's recoupment of drilling costs" if petitioner chose not to participate. (If by this respondent is now admitting that the caveat was, as petitioner has asserted, and as the trial court decided[1], an election by respondent to drill all of the leases, then petitioner happily concurs in this interpretation because then respondent is admitting that it breached its obligation to drill all of the leases following such an election.) However, the contract *by itself* only gave respondent a one-half interest. In making its assertion, respondent cited its letter (a part of the contract) of October 12, 1954, to petitioner. (App. C 3, p. 37a et seq.) This letter opens, "We are the owners of an undivided one-half interest in the oil and gas leases. . . ." It continues, "Notwithstanding the fact that we only own an undivided half interest . . ." Furthermore, in the paragraph dealing with non-participation by petitioner it is stated "if any well is productive in which you are a 'non-participating party' Frankfort Oil Company shall own all pipe and equipment in or on said well and 7/8ths of all working interest production from such well . . ."

[1] Conclusion of Law No. 4 of the trial judge reads in part

"4. The defendant elected to drill the remaining undeveloped leases and in then failing so to do breached its contractual agreement with plaintiff." (Conc. 4, App. p. 7a)

Respondent's attention is called to the language of the contracts it drafted, as set out above and in more detail in the instruments themselves. Respondent could only acquire a 7/8ths interest in a well if all of the following circumstances occurred:

(1) if it chose to drill a given lease,

(2) if petitioner elected not to participate, and

(3) if the well proved productive.

Unless all these conditions occurred respondent's interest remained at one-half. Furthermore, if petitioner chose to drill and respondent refused to participate, respondent's interest became zero.

What purpose motivates respondent for the first time to claim that the contract itself gave it a "present 7/8 interest" in all the leases? In all previous stages of this litigation it denied this, since to admit it would demand a companion admission of a duty to drill each lease before it expired. The answer to this puzzle lies on page 11 of respondent's Brief where it entangled itself in Oklahoma law on slander of title.

Under Oklahoma law, respondent states on page 11, malice can exist only in asserting a claim in which there is "no reasonable basis for belief. If the claim is made in good faith, there can be no recovery." Apparently forgetting this "reasonable basis for belief" norm for the moment, respondent plunges forward on its "good faith" leg, referring to its "1/2 interest", to "advice of counsel," to its "right of first refusal" on petitioner's "1/2 interest," and to a certain pending lawsuit. Respondent then seems to have tripped on the fact that it had claimed a 7/8th interest by its caveat. What "reasonable basis for belief" is a 1/2 interest for assert-

ing a ⅞ interest? Respondent realized the obvious answer. But to complete this carefully fabricated defense, respondent did not hesitate to repudiate its position in all former stages of the case and to put forward this absurd and strained interpretation of the original contract to give itself a "present ⅞ths interest" in all the leases at the time of the caveat, when only two leases of twelve had been drilled. Both lower courts unequivocally interpreted the contract standing alone to give a ½ interest to each party.

## IV. RESPONDENT'S QUESTIONS PRESENTED

Respondent's Question I should be disregarded because it asserts a fictional legal requirement, i.e., that a successful litigant must object to findings or lack of findings by the trial court. This is contrary to Rule 52 for the reasons stated in the Petition at pp. 35-37. Furthermore, having propounded this unfounded requirement, in its Question, respondent leaves it there suspended, with the only further mention of it as a footnote at p. 14, but without any citation of authority. In effect, respondent would delete the last sentence of Rule 52(b).

## V. APPLICATION OF OKLAHOMA LAW

In Part II of its Brief, respondent claims that the Court of Appeals "properly dealt" with the Oklahoma law. Petitioner contests this.

### A. Extent of Fiducial Duties

It was error to limit respondent's fiducial duties to the explicit terms of the contract in deciding whether petitioner was entitled to receive geological and geophysical information from respondent. Such is not the Oklahoma rule. The Court of Appeals distinguished

*Blackstock* v. *Caston*, 184 Okla. 489, 87 P. 2d 1087, because the defendant there was enriched by its concealment of data from plaintiff, and respondent here was not shown to have been so enriched. *The Tenth Circuit was in error on this point. It is not necessary that a slanderer of title be enriched by his wrongdoing. It is sufficient that the plaintiff has lost something.* In fact many cases involving this tort arise from instances in which a plaintiff loses a sale of land to a third party because the defendant had maliciously clouded the title.[2] In *Winn* v. *Warner*, (1947, Tex. Div. App.) 199 S.W. 2d 560, a $23,000 award for loss of an oil and gas lease was affirmed. The defendant's slander of plaintiff's title had prevented plaintiff from drilling the lease before it expired. Defendant was not enriched.

The Court of Appeals was in error in not following *Blackstock* and ignoring the irrelevant matter of unjust enrichment. The decision of the *Blackstock* case was based on the general rule regarding joint adventurers that there is a requirement of the "utmost good faith" in the parties' dealings and not on any such narrow and mechanical reasoning that the defendant must be unjustly enriched.

In *Blackstock*, Caston and three others contracted with the Blackstock Oil Company to drill three wells free of charge upon certain land owned by them. In return for drilling, Blackstock was to have an undivided half interest in any oil discovered.

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[2] See *Kingkaid* v. *Plummer* (1925) 111 Okla. 197, 239 P. 628; *Ward* v. *Mid-West & Gulf Co.* (1923) 97 Okla. 252; and *New England Oil & Pipe Line Co.* v. *Rogers* (1931) 154 Okla. 285, 7 P. 2d 638.

Just as in this case, so far as the report of the decision indicates, the contract between Blackstock and Caston made no provision "requiring that [Blackstock] furnish all geological and geophysical data."

Just as in this case, when Blackstock drilled, it struck a prolific oil field.

Then, instead of giving Caston complete geological information, Blackstock falsely reported that "the well was a water well and would produce only a small quantity of oil." As a result Caston and his three associates sold their interest in the lease to Blackstock for $5,000 when it was in fact worth $100,000. (Compare this false representation with that of Frankfort when it reported Erwin #2, a well to the north, as a producer when it was a dry hole.)

Holding that, under Oklahoma law, the parties were engaged in a joint adventure, the Supreme Court of Oklahoma said that there must be "the fullest and fairest explanation and communication" and that "a duty to speak may arise from partial disclosure." Commenting it was unnecessary for Caston and his associates to establish that Blackstock was "guilty of deliberate fraud," the Court went on to say:

> "it was his duty to give them full and complete information regarding the condition of the well and the prospects of completing the same as a producer."

Accordingly, the Supreme Court of Oklahoma upheld the finding of the Trial Court that

> "defendant, did not discharge in full the duty devolving upon it in its fiduciary relation to plaintiffs."

From this statement it is evident that the decision of the Court of Appeals conflicts with the law of Oklahoma as laid down by that State's highest court. Oklahoma does not require that there be an express provision with respect to geological information *in the written contract* to protect a party to a Joint Venture agreement. Mr. Justice Osborn of the Supreme Court of Oklahoma points out in his *Blackstock* opinion, one joint venturer cannot "convey a false impression by disclosure of some facts and the concealment of others" since "concealment is in effect a false representation that what is disclosed is the whole truth."

Moreover, the Court of Appeals is wrong in excusing respondent because petitioner "never believed nor acted" upon its misinterpretations. The concealment hereby respondent of the geological information made it impossible for petitioner to interest Joe Wolf and the Summit Drilling Company.

At trial, Wolf testified that the very refusal of respondent to drill south (when it possessed geological studies of the lease block) caused Wolf to refuse to finance petitioner. Wolf quite naturally concluded that if the land to the south "wasn't good enough" for respondent to drill, it was not good enough for him (T. R. 188). He further testified that he would certainly have drilled if he had seen the geological data withheld by Frankfort, because it showed a "terrific picture."

**B. Effect of a General Finding**

At page 17 respondent, in discussing *Wilkerson v. Wasson*, 110 Okla. 66, 235 P. 206, states that there was no general finding in that case from which malice could

be implied and that the Oklahoma court "found" that the defendant had not acted in good faith. Respondent mistook the reasoning of the Supreme Court of Oklahoma for what occurred in the trial court. The trial court did make a general finding for plaintiff and in that connection the Supreme Court said, "*when plaintiff proved that defendants placed that notice on record, and the court found for the plaintiff, it was bound to have found that there was malice in putting it there.*" No other conclusion can be drawn from this language than that the trial court did not make a specific finding of malice but made a general finding for plaintiff from which the Oklahoma Supreme Court was able to infer, by implication from the general finding, that the trial court had found malice.

Petitioner has urged on this Court and on the Court of Appeals the significance of the general finding in his favor. As *Wilkerson* v. *Wasson* holds, a general finding for plaintiff in a slander of title action is "bound" to include an implied finding of malice. That is the law of that case. Under that rule what other effect can be given the language of the trial judge here in his Conclusions of Law? Contrary to respondent's parenthetical suggestions at pages 9 and 18, it is well established that labeling a finding as a conclusion is "immaterial". *Central R. Signal Co.* v. *Longden*, 6 A 7 191 F. 2d 310. Conclusion No. 5 begins:

> "5. If, in fact, the defendant did not intend to elect to drill all these undeveloped leases at the time of the caveat filing, such filing was a deliberate, unjustified assertion of interest in these leases which prevented plaintiff from successfully taking action to develop some or all of these leases prior to their expiration, a right plaintiff held under the terms of the contract." App. p. 7a

Yet the Court of Appeals ignored the obvious import of these words that petitioner's title was slandered. Compare this with the holding of the same Circuit in the earlier case of *Burkhard* v. *Burkhard*, 175 F. 2d 593, 596:

> "The court did not make a specific finding on" whether defendant's relations with deceased were illicit, "but since it found in favor of" defendant, "it is implicit in its findings that the issue was resolved against" plaintiff.

In petitioner's case not only was there a general finding of slander of title in petitioner's favor, but the plain words of the trial judge indicated he found malice.

## VI. ADDITIONAL ERRORS

Other errors in the Brief in Opposition are so numerous that they will be dealt with in the order they appeared and as briefly as possible.

1. At page 6, respondent completely misrepresents the trial court's finding when it states "respondent also had geological information which indicated the desirability of drilling to the northeast." It cites Finding 22. Finding 22 reads:

> "22. Between March 1 and June 28, 1955, the defendant drilled five wells to the north of the Erwin No. 1 and the Meadors Estate No. 1, none of which were productive in the second Wilcox. These wells were drilled at a time when the seismic and other geological data indicated that the second Wilcox high lay to the south of the Erwin No. 1 and the Meadors Estate No. 1, and that the structure to the north was a separate structure with shallower sands." (App. p. 5a)

Not only was the above finding misrepresented, but it was cited out of context. The finding preceding it shows clearly what the trial judge meant in his findings. Finding 21 reads:

> "21. The Erwin No. 2 was dry in the second Wilcox but was plugged back to the Oswego and reported as a second Wilcox producer. Moreover, the Erwin No. 2 was credited with full production from the second Wilcox when in fact oil was actually run from the Erwin No. 1. On June 7, 1955, Frankfort started the Amerada-Stanolind in the SE 4 of NW 4, a diagonal offset to the northeast of the Erwin No. 2, and an offset to the west of the Clark No. 1." (App. p. 5a)

**2.** In the final full paragraph on page 6, respondent asserts that one of the wells drilled after Erwin No. 1 was a producer, once again citing the trial court's finding. Respondent apparently refers to Erwin No. 2 which was found by the trial court to have been a dry hole, although fraudulently reported as a producer by respondent. (Finding 21, App. 5a) This fraud was perpetrated to justify the subsequent wells drilled further north and east into barren ground.

**3.** At page 7, respondent cites Finding 26 for its allegation that petitioner began drilling on July 1, 1955 on the Thomas and Christian leases "without notice to respondent in violation of the terms of the contracts." This is a misrepresentation of that finding which says nothing about contracts or violations thereof, or for that matter about the Christian lease. It reads in toto:

> "26. On July 1, 1955, the plaintiff, without notice to the defendant, commenced drilling operations upon the Thomas tract (NW 4 of Section 2)." (App. p. 6a)

Finding 28 contradicts respondent that petitioner breached the contract in any manner.

> "28. *Plaintiff substantially performed all obligations* resting upon him under the contract with defendant." (Emphasis added.) (App. p. 6a)

Furthermore, respondent was well aware that petitioner had to move in on July 1, 1955 if he wanted to save the leases which would expire if work was not begun that day. He had pleaded with Frankfort to drill. After work was begun on July 1 respondent never made any move to participate because it knew it had no rights.

**4.** In footnote 2 on page 7, it is asserted that Inland offered $100,000 for petitioner's interest in the entire lease block. As pointed out in the Petition, the $100,000 was to be provided by petitioner's joint venturer, Frankfort, because Inland was $200,000 down the road to bankruptcy at that time. (See Petition, page 7.

**5.** At page 13, respondent asserts that the contracts themselves "were not filed because of their bulk", that the caveat "merely gave notice of the underlying contracts". As demonstrated above, the caveat did not merely give notice of the underlying contracts. It is a fair inference that it was filed not because the contracts were bulky, but rather to slander petitioner's title in his half interest to the lease block. No person carefully examining the facts of this case and the instruments involved could in good conscience state, as respondent does, that the effect upon petitioner "would have been the same" if the contracts themselves had been filed instead of the caveat, as respondent asserts.

**6.** Another Oklahoma case cited by respondent is *Wood v. Mid-West Gulf Co.*, 97 Okla. 252, 223 P.

170. This case was cited at page 11 and at page 16. It is cited at page 11 for the proposition that if the defendant acts in good faith in making a false assertion of title, there is no slander of title involved since malice is absent. Petitioner has no quarrel with that generality. At page 16 the case is again cited, but there the findings in *Ward* are paralleled with the findings of the District Court in this case with the statement "those findings clearly establish the absence of malice under Oklahoma law." Respondent infers that the findings in this case and in the *Ward* case are similar. The finding of the trial court in the *Ward* case was:

> "The court finds . . . that there was no bad faith on the part of either of the defendants."

No such finding was made in the present case by the District Court. On the contrary, a reasonable reading of the findings of fact and conclusions of law involved indicate that the court's general finding in favor of petitioner was predicated on the fact that malice on the part of the respondent existed.

**7.** Respondent's contention, at p. 17 of its Brief, that petitioner's suit was based only on a breach of contract theory is without support. The Court of Appeals opinion (279 F. 2d 136, at 138) states quite plainly:

> "The complaint in the court below contained two counts, the first alleging breach of contract *and tort* . . . ." (Emphasis added)

The Court of Appeals then went on to discuss the various bases of this case: breach of contract, breach of fiducial duty, and slander of title. It failed to discuss the tort of malicious wrong which had also been

pleaded and proved by petitioner. See p. 42, et seq. of the Petition.

## VII. SUMMARY

Respondent's Brief in Opposition did not directly meet the important questions raised by petitioner. In fact it avoided them. Respondent argued that no important questions involving Rule 52 of the Federal Rules of Civil Procedure are present in this case, that the Tenth Circuit here actually affirmed the District Court's findings. It further argued that the Tenth Circuit faithfully applied the appropriate Oklahoma Law. Neither contention is correct. The preceding sections of this Reply demonstrated how insubstantial are the foundations for these contentions.

The essence of Petitioner's questions relating to Rule 52 is that the District Court findings *and* conclusions, made after full opportunity to hear all evidence, and, most important, to see and judge all the witnesses, sustained Petitioner's case not only on a breach of contract theory, but also and equally on the theories of breach of fiducial duty and slander of title. The findings and conclusions taken as a whole, as they must be, allow no other conclusion. This being so, petitioner is entitled to have the judgment of the trial court stand unless the findings are "clearly erroneous". The Tenth Circuit did not indicate that the findings were "clearly erroneous". Ignoring the general finding for petitioner, it stated that a critical finding was absent, that of malice. Having reached that conclusion, it is petitioner's view that the Court of Appeals was bound by Rule 52 and the numerous decisions thereunder to remand to have the trial court supply that finding.

This rule was applied in this way in the last term of this Court in *Stratton v. United States*, 363 U.S.

278, a tax case hinging on whether a $20,000 payment to Stanton was a "gift". The District Court made the "simple and unelaborated finding" that it was a "gift". This Court remanded to the trial court for more detailed finding on this vital and ultimate fact because the "reviewing court" had "not the assistance of an indication" of the basis for the trial court decision.

In so remanding, this Court was reiterating the responsibility that is solely that of the trial court under Rule 52, that of finding the facts. In another tax decision handed down the same day as Stanton this Court declared the "principle of restriction of the appellate court to a jury verdict." In *United States* v. *Kaiser*, 363 U.S. 299, Mr. Justice Brennan said:

> "We need not stop to speculate as to what conclusion we would have drawn had we sat in the jury box rather than those who did. The question is one of the allocation of power to decide the questions . . . ."

In neither case is Rule 52 allocating the "power to decide" facts to the trial court.

Returning to the *Stanton* case, we find the reason for this "allocation" and the motive underlying the remand of that case, again in Justice Brennan's words:

> "Decision of the issue presented in these cases must be based ultimately on the application of the fact finding tribunal's experience with the mainsprings of human conduct to the totality of the facts in each case . . . that the primary weight in this area must be given to the conclusions of the trier of fact."

For the reasons stated here and in the petition, this writ of certiorari should be summarily granted, and this Court should direct the Court of Appeals to reinstate the judgment of the District Court or, in the alternative this Court should remand this case to permit the District Court to make specific findings on such matters as the Court of Appeals found lacking.

Petitioner further respectfully requests this Court to grant the Writ of Certiorari so that the findings and conclusions of triers of fact in the Tenth Circuit may stand under Rule 52 on an equal basis with those of the other Circuits.

PEYTON FORD
1000 Connecticut Ave., N. W.,
Washington, D. C.
*Attorney for Petitioner*

*Of Counsel:*

FORD, LARSON, GREENE
AND HORAN
Washington, D. C.

JOHN B. DUDLEY, JR.
DUDLEY, DUDLEY & DUDLEY
Oklahoma City, Oklahoma

CLYDE J. WATTS
LOONEY, WATTS, LOONEY
& NICHOLS
Oklahoma City, Oklahoma

P. D. ERWIN
Chandler, Oklahoma